

OPINIONS
OF THE
Corporation Counsel and
Assistants

FROM
JANUARY 1, 1920, TO APRIL 15, 1923.

PUBLISHED BY AUTHORITY OF THE
CITY COUNCIL
OF THE CITY OF CHICAGO

Compiled and Edited by
SAMUEL A. ETTELSON
Corporation Counsel



EDITOR'S NOTE.

This volume is the last of the three books containing selected opinions rendered by the Law Department of the City of Chicago during the administration of Hon. William Hale Thompson. The first volume covered the period from May 1, 1915, to June 30, 1916; the second volume, from July 1, 1916, to December 31, 1919; and this volume from January 1, 1920, to April 15, 1923. The statements contained in the preface, which appears in the first of these volumes, applies to all three of the books.

SAMUEL A. ETTELSON,
Corporation Counsel.

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JANUARY 1, 1920, TO APRIL 15, 1923.

**Amount Due on Pensions of House of Correction
Employees.**

January 8, 1920.

HON. JOSEPH SIMAN, Superintendent, House of Correction.
Dear Sir:

We are in receipt of your communication of December 24, asking us to advise you whether or not the trustees of the House of Correction Employees' Pension Fund may, as a matter of precaution, in order to keep the funds solvent, pay applicants for pensions the sum of \$480 per annum instead of the sum of \$600 per annum as fixed by statute.

In reply to this inquiry, we beg leave to advise you that the Board of Trustees of the House of Correction Employees' Pension Fund have only such powers as are conferred upon them by the statute creating such board. Paragraph 10 of Section 6 of the House of Correction Employees' Pension Fund Act provides as follows:

“10. Any contributor to said fund who shall have been in the service of said House of Correction for a

period of twenty (20) years, and shall have contributed to said fund for the same period, shall have the right to retire and become a beneficiary under this act after July 1, 1916, and receive a benefit or annuity, which shall be the sum of six hundred (\$600) dollars per annum, for each and every beneficiary of said pension fund, the same annuity to be paid in equal monthly installments, and in case of insufficient funds in the treasury, the treasurer shall be empowered to pay to the beneficiaries a *pro rata* amount of the sum in the treasury, said *pro rata* amount to be divided equally among the beneficiaries entitled to the same."

When applications for pension are received and there are funds enough on hand to pay all applicants the amount per annum provided for by law, namely, \$600, it is the duty of your board to grant pensions in accordance with the provisions of the statute. If there are not sufficient funds on hand to pay all applicants for pensions the amount of \$600 per annum provided for by law, the treasurer of your fund is empowered under the statute to pay to the beneficiaries a *pro rata* amount of the sum in the treasury, said *pro rata* amount to be divided equally among the beneficiaries entitled to the same.

It is our opinion that your board is without power or authority to reduce the amount of pensions provided for by statute when there are sufficient funds in the hands of your treasurer to pay all pensioners in full.

Replying to your inquiry as to the age limit in Section 2, we beg leave to advise you that any and all employes of your institution who reached the age of fifty years on or before July 1, 1919, and who were not employed in the House of Correction for ten years or more prior to said date are exempt from the provisions of the act establishing the House of Correction Employes' Pension Fund.

Yours very truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Advertising Information of Horse Races for the Benefit
of Bettors.**

January 12, 1920.

HON. JOHN J. GARRITY, General Superintendent of Police.

Dear Sir :

Your communication forwarded by the prosecuting attorney together with booklet issued by the Standard Turf Guide, Room 403, 22 W. Quincy street, advertising that they can give information concerning horses which are liable to win races at race tracks, to advise a prospective bettor, so that he may more intelligently gamble on the pick of the race, and asking whether or not this is in violation of any law or ordinance, has been referred to me for reply.

Section 991 of The Chicago Code of 1911 provides as follows :

“§991. CIRCULATION OF BETTING ADVERTISEMENTS PROHIBITED—PENALTY.) No person shall display or exhibit or distribute or cause to be distributed any circular, blank, handbill, pamphlet or other thing containing any notice, advertisement or mention, giving or purporting to give information where or by whom pools are sold, upon the result of any trial or test of skill, speed or power of endurance of man or beast, or upon the result of any political nomination, appointment or election, under a penalty of not less than fifty dollars nor more than two hundred dollars for each offense.”

We are of the opinion that the above ordinance is applicable and prosecution may be commenced under it.

Yours very truly,

JAMES S. NELSON,
Assistant Corporation Counsel.

Approved :

SAMUEL A. ETTELSON,
Corporation Counsel.

Payment of Bonuses to Employees.

January 19, 1920.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

In your letter of recent date you ask us to furnish your committee with an opinion as to the right of the city to give bonuses to its employes.

It is hard to answer so general a question in a manner that will furnish a guide to a general course of conduct with respect to bonuses. There are so many different conditions that may arise that it would be far safer to state the concrete case as to each individual employe that you have in mind. We can only say in reply to your general question that the answer depends on what is to be regarded as a bonus and the manner in which it is to be paid, as we will endeavor more fully to explain.

The word "bonus" is susceptible of a great many definitions. If it is to be regarded simply in the light of a gratuity the City Council would have no right to award a bonus to an employe. It can not in any event give a bonus to an officer, since his compensation is fixed by law and he must perform all the duties of the office without extra compensation.

Bonus is defined in Corpus Juris (Vol. 9, p. 135) as a "premium," a "definite sum agreed on," a "consideration given for what is received," a "benefit given in return for the benefit received," a "sum paid for services or on a consideration in addition to or in excess of what would ordinarily be given," "the payment of a sum to weaken or destroy the fidelity of a trusted agent," a "payment without compensatory services intended as a bribe," a "bribe," etc. Thus, it will be seen that the definitions run all the way from a payment on a contractual obligation to the payment of a bribe. All these and many more definitions can be drawn from judicial interpretations of the word.

We assume that the City Council, if it adopted a policy of awarding bonuses, would place some fixed standard as the measure of service from the employe with the promise of ad-

ditional compensation in case the service is greater. We also assume that provision for such bonus would be made by ordinance in some way that would amount to the payment of extra compensation that has been duly appropriated for and is available. If this is strictly adhered to we are of the opinion that bonuses given in pursuance thereof would be lawful.

To further illustrate our meaning, we call attention to the fact that provision is now made for advancing employes by the rules of the Civil Service Commission in case of a vacancy, and sometimes even an increase of salary during the fiscal year based on length of service; also to the fact that overtime is provided for by lawful appropriations made therefor. A bonus may be provided for on a basis equally lawful.

The rule with respect to officers not being entitled to extra compensation under any circumstances is stated in Dillon on Municipal Corporations, Sections 426-7, and the same is quoted approvingly in *Gathemann v. City of Chicago*, 263 Ill. 292. At the same time our Supreme Court, in the *Gathemann* case, while denying *Gathemann's* right to overtime, sanctioned the payment of overtime to such employes as were entitled to it under the terms of the appropriation bill.

We, therefore, beg to advise you that in case a plan can be worked out by which a bonus can be awarded as additional compensation for either additional service or for meritorious service of a character beyond what is ordinarily required of an employe, there would be nothing unlawful in paying such extra compensation. On the other hand, if such payment were made merely as a gratuity or without a consideration in the shape of such additional or extra-meritorious service, it would be unlawful.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Abolition of Position by Failure to Appropriate.

January 22, 1920.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir :

We are in receipt of your communication of January 8, requesting us to advise your committee whether or not a position executive or subordinate, created by ordinance, can be abolished by failure to appropriate for same in the appropriation bill.

We understand from talking with you that when you refer to a position "executive or subordinate" you mean an office created by an ordinance as distinguished from a position or place of employment not so created.

In reply, we beg leave to advise you that Section 73 of Article VI of Chapter 24, Hurd's Revised Statutes 1916, page 111, provides that the City Council may, in its discretion, from time to time by an ordinance passed by a two-thirds vote of all the aldermen elected, provide for the election by the legal voters of the city or the appointment by the mayor, with the approval of the City Council, of a city collector, a city marshal, a superintendent of streets, a corporation counsel, a city comptroller, or any or either of them, and such other officers as may by said council be deemed necessary or expedient, and that the City Council may by a two-thirds vote, by ordinance or by resolution, discontinue any office so created.

In our opinion it is immaterial whether or not the person holding the office in question is the head of one of the principal departments of the city government or is merely holding a subordinate office, created by ordinance, in any of the executive departments of said city government.

In the case of *The People v. McCann*, 247 Ill., page 130, the Supreme Court held that an ordinance creating an executive department to be known as the Department of Police, and providing for a general superintendent of police, an assistant general superintendent of police, and one inspector of police for each police division, created the office of inspector of police and made the person holding the said office of inspector of

police an officer of an incorporated city and liable as such officer for all acts performed by him while discharging the duties of said office.

The failure of the Council to appropriate a salary for an officer of the city does not constitute an abolishment of an office created by ordinance. Where no office has been created by ordinance and where the appropriation bill merely provides for the salary to be paid an individual holding a position or place of employment not created by ordinance, then the failure of the Council to make such appropriation ends the particular position or place of employment.

In order to abolish an office created by the City Council of the City of Chicago by an ordinance, it is, in our opinion, necessary to have the ordinance creating the office repealed by a two-thirds vote of all the aldermen elected to the City Council.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Powers of Vehicle License Commission.

January 23, 1920.

HON. JOHN H. ALCOCK, First Deputy Supt. of Police and
Chairman of the Public Vehicle License Commission.

Dear Sir:

We are in receipt of your communication of January 17 to the general superintendent of police, together with a copy of fifteen rules adopted by your commission, together with your request for an opinion as to the power of the Vehicle License Commission to adopt rules and as to the validity of the fifteen rules prepared by the Vehicle License Commission.

In reply, we beg leave to advise you that Section 2 of an ordinance passed by the City Council December 29, 1919,

and appearing on page 1714 of the Journal of the Proceedings of the City Council of said date, creating the Public Vehicle Commission and defining its powers and duties, provides as follows:

“POWERS AND DUTIES OF SAID PUBLIC VEHICLE LICENSE COMMISSION.) It shall be the duty of the Public Vehicle License Commission of the City of Chicago to license and inspect public vehicles, taximeters, to conduct the examination of applicants for licenses to drive public vehicles, and the licensing of said drivers, and to make all necessary rules and regulations for the proper enforcement of the provisions of this ordinance and for the protection of patrons of all such public vehicles.”

The above section of the ordinance confers upon the commission the power to make all necessary rules and regulations for the proper enforcement of the provisions of this ordinance and for the protection of patrons of public vehicles. We have carefully read the fifteen proposed rules submitted to us, and it is our opinion that the Public Vehicle License Commission has the power under the provisions of the ordinance above referred to to adopt the rules in question.

In regard to Rule 5 proposed to be adopted by your commission, we beg leave to advise you that under Section 2 of the ordinance you are authorized to adopt any rule that will protect the patrons of public vehicles from being imposed upon by the owners or drivers of automobiles, and whenever you find a condition existing that enables automobile owners to deceive the public and thereby impose a higher rate of mileage than the patron expects to pay, it is our opinion that under the power conferred upon you in Section 2 of the ordinance you are authorized to adopt such rule or rules as your commission may in its discretion determine upon in order to meet such condition. The rule in question prohibits the issuance of a public vehicle license to the owner of an automobile, autocar or other similar vehicle if such vehicle is so constructed, designed, painted or labeled as to be an imitation of the automobiles, autocars or other similar vehicles of any other person, firm or corporation engaged in the business of operating public vehicles in the City of Chicago, and when such

imitation is calculated to deceive the patrons of public vehicles. The courts in various states have repeatedly recognized a property right to exist in the color or design of public vehicles and have issued injunctions restraining persons, firms or corporations from imitating the trade mark, color or design of vehicles owned by persons, firms or corporations engaged in the business of carrying patrons for hire on the public streets of cities.

The Public Vehicle License Commission of the City of New York has adopted and has now in force and effect in that city a rule similar to Rule 5 that your commission desires to adopt, and the question of the validity of said rule has been sustained by the courts of New York. A writ of mandamus was refused an applicant who sought to compel the Vehicle License Commission of New York to issue a license where the applicant had violated the provisions of the rule similar to proposed Rule 5 of your commission. In passing upon the question, Mr. Justice Lydon of the Supreme Court of New York, in the case of *People ex rel. Duffy v. Gilchrist*, used the following language:

“This is an application by an owner of a taxicab to mandamus the commissioner of licenses to issue to the relator a license for the operation of his cab in the City of New York. The commissioner of licenses has refused to issue such license to the relator on the sole ground that the cab so to be operated is so painted that it is identical in color and design to the cabs of a company engaged in the taxicab business in this city and which for a long period of time has owned and operated a large number of cabs all similarly painted, and known as the Black and White Cabs, and that the public might be led into believing that the relator’s cab was one of those belonging to the Black and White Company. This court has repeatedly issued injunctions for the purpose of preventing such imitations. I therefore find that the commissioner of licenses acted within his statutory powers in denying the application of the relator to grant a license.”

The courts of our city have also repeatedly issued injunctions restraining the owners of public vehicles from operating cars constructed, painted or designed in such a manner as to imitate the cars of other firms or corporations who for a long

time have operated their cars in the streets of the city, carrying passengers for hire, and it is our opinion that, if the question is ever presented to the courts under Rule 5 of your commission, the precedent established by the courts of New York will be followed by our courts.

It is therefore our opinion that all of the fifteen rules proposed to be adopted by you are valid and lawful, and that your commission possesses the necessary power under the ordinances to adopt the same.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Power of City to Regulate Private Banks.

January 29, 1920.

TO THE HONORABLE THE CITY COUNCIL
OF THE CITY OF CHICAGO.

Gentlemen:

On January 5 your honorable body passed the following order:

“ORDERED, That the corporation counsel be and he is hereby directed to render an opinion to the City Council, at an early date, on the subject of the power of the City Council to pass an ordinance licensing and regulating private banks.”

In response to the above request we desire to advise your honorable body that paragraph 91 of Section 1 of Article V of Chapter 24, Hurd's Revised Statutes 1917, page 323, confers upon the City Council the power “To tax, license and regulate auctioneers, distillers, breweries, lumber yards, livery stables, public scales, money changers and brokers.” The power of the City Council of a city to license and regulate private banks has been passed upon by the Supreme Court of Illinois in the case of *Hinckley v. The City of Belleville*, 43

Ill., page 184, and the Supreme Court in construing a section of the charter of the City of Belleville, conferring upon its City Council the power to license, tax and regulate "money changers" said:

"The City of Belleville was incorporated in 1850, by an act of the Legislature, giving it the same powers that were granted in the charter of Springfield. Under this charter it was authorized 'to license, tax and regulate auctioneers, merchants and retailers, grocers, taverns, ordinaries, hawkers, peddlers, brokers, pawnbrokers, and *money-changers*.' In 1859, a new charter was adopted with an express reservation of the powers contained in the old. The City Council has passed an ordinance requiring bankers to take out a license, paying therefor \$100, and the question presented by this record is, whether the council has the power to do this. The agreed case upon which this appeal comes before us, merely describes the appellant as a banker, without particularizing the kinds of business transacted by him. We construe the agreed case as meaning, that he transacts the business ordinarily done at private banking houses in this state. Without considering the question as to how far a banker and a money-broker are the same in the common parlance and business usages of this state, there is at least no doubt that the term 'banker' includes all the business of a money-changer. A money-changer is defined by Webster to be 'a broker who deals in money or exchanges.' The word has passed out of common use, but when used, we understand it in the sense given by the learned lexicographer. Thus defined, it is certainly included in the business of a banker, and constitutes, indeed, the greater part of it. So, also, the buying and selling of uncurrent funds, and the exchanging one kind of money for another, are equally the practice of the money-changer and the banker. Indeed we are not aware of any kind of business understood to be within the former term, which is not considered a part of the business of a private banker, as carried on within this state, and we must construe the term 'banker,' used in this agreed case, as comprehending the various kinds of business ordinarily carried on by bankers among our own people. If, then, the business of the banker includes that of the money-changer, he may certainly be required to take out a license under that provision of the charter which applies to money-changers. While the appellant is a banker he is also a money-changer."

We have made an exhaustive search and have been unable to find any decision of our Supreme Court reversing or modifying in any way its interpretation of the word "money-changers" as construed in said opinion, and in view of this decision of our Supreme Court it is our opinion that your honorable body possesses express power to license and regulate private banks within the City of Chicago.

Yours very truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Refund of Music Permits.

February 10, 1920.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

We are in receipt of your communication of June 18, 1919, in which you advise us that there are before the finance committee numerous claims for refunds of the money paid for music permits in places where liquor was sold, and also requesting us to advise you as to how the payments of the musical permit fees were affected by the passage of the dry cabaret ordinance.

In reply, we beg leave to advise you that on March 26, 1918, the City Council passed an ordinance (Council Journal March 26, 1918, pages 2510 and 2511) prohibiting any person, firm or corporation licensed to conduct a dramshop from giving, conducting or allowing any exhibition, show, amusement, cabaret, entertainment, performance whatsoever, whether musical or otherwise, or any dance or skating either of patrons or other persons, provided, however, that in any such saloon or dramshop or place conducted therewith and licensed under and by virtue of the dramshop ordinances of the city, as amended, musical instruments for the entertainment of the patrons thereof may be played by a musician or musicians

on some musical instrument or instruments, upon the person, firm or corporation conducting such place securing a permit therefor from the City of Chicago and upon the payment therefor of \$300 in advance to the city collector for each permit issued.

All of the persons who have filed claims with you for refunds made applications for musical permits in accordance with the provisions of said ordinance, and the permits issued permitted the persons who secured the same to conduct musical entertainments in places where liquor was sold.

On August 14, 1918, the City Council passed an ordinance licensing and regulating public places of amusement, commonly referred to as the dry cabaret ordinance. The dry cabaret ordinance prohibits any person, firm, society, club or corporation from conducting, presenting or allowing, at any public place of amusement, any amateur theatrical entertainment, exhibition, show, amusement, cabaret, entertainment, act of entertainment, performance, whether musical or otherwise, or any dance or skating either of patrons or other persons except as provided by the ordinance passed August 5, 1918. The dry cabaret ordinance provides a license fee ranging from \$25.00 to \$100.00, the said fee being based upon the number of square feet and the seating capacity of the place for which the permit is secured.

We desire to advise your committee that there is no conflict in the terms and provisions of the ordinances above referred to. The ordinance passed March 26, 1918, was intended to regulate and license instrumental musical entertainments in licensed dramshops, while the ordinance passed on August 14, 1918, licensed and regulated public places of amusement where intoxicating liquor was not sold. A dramshop keeper who desired to conduct instrumental musical entertainments in his dramshop could not secure a license or permit for that purpose under the ordinance passed August 14, 1918, and no license was issued to any licensed dramshop keeper to conduct entertainments in his dramshop under said ordinance.

All of the persons who have filed requests for a refund of license fees paid by them filed a written application for a permit or license to allow them to have instrumental musical en-

tertainments in their respective establishments and voluntarily paid the fee provided for by the ordinance, and under the well settled law of this state the council is without power to refund any part of said fee. In discussing the power of the City Council our Supreme Court has held that money paid to the proper municipal officers for a license is a condition precedent to the issuance of a license and that the money goes at once into the public fund and can not be recovered from the municipality either at law or in equity, even though such tax, license fee or fine could not have been legally demanded and enforced.

Yates v. The Royal Ins. Co., 200 Ill. 206.

People v. McBride, 234 Ill. 146.

Our Supreme Court in the case of *Elston v. City of Chicago*, 40 Ill., page 518, in discussing a similar question, said:

“No case can be found where money has been voluntarily paid with a full knowledge of the facts and circumstances under which it was demanded, which holds that it can be recovered back upon the ground that the payment was made under a misapprehension of the legal rights and obligations of the party paying.”

We are satisfied that none of the applicants who have filed requests for refund with your committee will attempt to claim that the money paid by them to the city for the issuance of the permit provided for in the ordinance passed March 26, 1918, was paid under any misapprehension of their legal rights or obligations.

It is, therefore, our opinion that under the law the Council is without power or authority to order a refund of any part of the said fee of \$300 paid by each of the applicants for the issuance of a permit to allow instrumental musical selections to be played in their cabarets.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Bonuses to City Employees.

February 12, 1920.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

We are in receipt of your letter in which you inquire whether it would be legal for the city to give bonuses to its employes, in addition to regular salaries, on account of the increased or high cost of living.

In our letter of January 19, 1920, relating to the subject of bonuses, we had in mind a bonus that was to be awarded as additional compensation for extra services or for special meritorious service. We said then that in case a plan could be worked out by which some fixed standard was set so that the extra compensation would not depend on the discretion of the officer under whom an employe worked, it could probably be legally appropriated for.

We now learn that what you have in mind is the payment of extra compensation for the current year owing to extraordinary conditions which make the needs of employes greater but that such extra compensation is to be in the shape of a bonus instead of a permanent new level for the salaries in question.

The City Council could not in terms award extra compensation in the shape of bonuses "on account of the increased or high cost of living." That would be in the nature of a gratuity. But we have no doubt that some wording could be adopted which would separate the usual salary from what is added as additional salary for the current year and at the same time the whole process would, in effect, amount to fixing the salary for the current year. That is to say, the salary for the year 1920 would be the regular wage plus the bonus.

We do not favor such a course, owing to the fact that anything which tends to make an appropriation uncertain invites an attack from those who seek to avoid the payment of taxes on account of technicalities. Our Supreme Court has repeatedly held that the law must be followed with the utmost strictness in the matter of levying and collecting taxes, using

the expression "*strictissimi juris*." Therefore, while the likelihood of a successful attack on account of dividing a salary into two parts may be remote, we deem it our duty to say that such a course has a tendency to cause the appropriation to be looked upon as less certain than if it were fixed without conditions, provisos, reservations or other limitations.

There are no special statutory provisions concerning the fixing of salaries of employes. There are such provisions concerning officers, but, as we interpret these provisions, they do not apply to employes. Hence, the rule governing salaries of employes is contained in Section 1646 of the Code, which provides that salaries or compensation shall be determined and fixed by the City Council in the annual appropriation bill. This rule controls except where the City Council, by ordinance, establishes a different one for the current year, as it has done in the past.

There being nothing in the law which prevents the division of a salary into two parts as proposed, we are of the opinion that it can be done if found desirable, always provided it is done in such a way as to leave no uncertainty concerning the amount actually appropriated for each salary affected.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Issuance of Bonds for General Corporate Purposes.

February 14, 1920.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

In response to your request for an opinion on the right of the city to issue bonds for general corporate purposes, we submit the following:

The power of the city to borrow money and issue bonds therefor is derived from the Constitution and the Statutes.

It does not inhere in a municipal corporation, and it is not incidental to the usual grants of municipal powers. It must be expressly conferred, or it may be inferred where special and extraordinary powers are granted which require the expenditure of unusual sums of money and such borrowing power appears to have been the legislative intent. (Dillon, *Munic. Corp.*, Fifth Ed., Sec. 288 *et seq.*)

When such power is expressly conferred in general terms, as is the case in Illinois, it is only subject to such limitation as is expressly made by law. This is a rule so generally recognized that it requires no extended comment. Applying this rule to the law in this state, we find that the limitations placed on the power of the city to issue bonds are that they must come within the debt limit, they can be issued only for corporate purposes, new issues which do not refund existing bonded indebtedness must be submitted to the voters for approval, they must be made payable within twenty years, and provision must be made at the time of their issue for tax levies to pay for them.

The section of the Constitution which bears on the question at issue (Art. IX, Sec. 12) limits the indebtedness of the city to five per cent of the value of the taxable property therein as ascertained by the last preceding assessment for state and county purposes. The Cities and Villages Act (Art. V, Sec. 1, Clause 5) expressly confers on the city the right "to borrow money on the credit of the corporation for corporate purposes, and issue bonds therefor, in such amounts and form, and on such conditions as it shall prescribe," not exceeding the limit fixed by the Constitution.

Neither the Constitution nor the Statute in the sections above mentioned prohibits the issuance of bonds for general corporate purposes. The sole restriction as to the purpose is that the bonds can only be issued to borrow money for "corporate purposes." Nor is there any other section of the Constitution or Statutes which can be fairly interpreted as prohibiting the issuance of bonds for general corporate purposes.

It is often contended that because the Statute provides expressly for an annual tax levy for the current expenses of

the corporation, such provision must be construed so as to preclude the city from the right to raise funds for current expenses through the medium of bonds. This contention, so far as we are able to discover, has not been squarely presented or passed on by our Supreme Court, but such decisions as pass on analogous propositions or otherwise bear on the subject indicate to us that this view is not well founded. The city did, in fact, in very recent years (1913) issue general corporate bonds in the sum of \$2,800,000, and this issue has not even been attacked in the courts. We say that the question was not squarely passed on, because it may be contended that certain language to which we call attention later on is dictum, although to us it seems to have as much force as if the words used were a necessary part of the decision in the case.

The propriety of contracting corporate indebtedness was formerly considered a matter exclusively within the legislative discretion of the City Council, and the courts would not interfere with that discretion if the Council acted within the law. (*People ex rel. Thatcher v. Village of Hyde Park*, 117 Ill. 462.) The more recent act requiring the submission of ordinances authorizing the issuance of bonds to the voters does not abrogate the principle underlying that rule, but modifies it only to the extent that it makes it necessary for the City Council to obtain the approval of the voters when bonds are issued except where issued for refunding other bonds. The case of *People ex rel. Abt v. Bowman*, 253 Ill. 234, is a late case supporting our view that the discretion of the City Council (when approved by the voters) controls the matter. In that case a sanitary district had issued bonds on September 1, 1910, payable September 1, 1911. It was claimed that this was a mere shift or device to prevent a reduction of the tax of the district under the act concerning the levy and extension of taxes (the Juul Law). The court held that if the Board of Trustees, in the exercise of their discretion, deemed it advisable to borrow money for one year and issue bonds therefor, it had a right to do so. The court said: "There is nothing in the statute or in the constitution that prohibits a municipality from issuing bonds in good faith and for a proper purpose, payable in one year." (P. 248.) This deci-

sion is in point not only on the question of the discretion of the local legislative body but also as re-affirming the doctrine that we must look to the constitution or the statutes for limitations on the right of the municipality to issue bonds.

With respect to the contention that because the statutes make provision for current expenses the city has no right to incur bonded indebtedness therefor, it would seem that the case of *Stone v. City of Chicago*, 207 Ill. 492, is a strong authority against such theory. The case was one that was brought against the city and its mayor and comptroller to prevent the issuance of bonds the proceeds of which were to be used for paying off judgments. There were two grounds of objection urged. One was that the debt limitation would be exceeded. We are not concerned with this point in passing on the question before us. The other point was that inasmuch as cities are given power to borrow money with which to pay judgments recovered against them by the last paragraph of Section 3 of Article VII of the Cities and Villages Act, that method of raising funds with which to pay judgment indebtedness of a city is exclusive. That paragraph reads as follows:

“Should any judgment be obtained against the corporation, the mayor, or president of the board of trustees and finance committee, under the sanction of the City Council or board of trustees, may borrow a sufficient amount to pay the same, for a space of time not exceeding the close of the next fiscal year—which sum and interest shall, in like manner, be added to the amount authorized to be raised in the general tax levy of the next year, and embraced therein.”

It will thus be seen that the question presented to the Supreme Court is strictly analogous to the one that would be urged if general corporate bonds were issued, viz., that since the statute makes special provision for current expenses general corporate bonds may not be issued for that purpose. In fact, it may well be argued that the case presented was much stronger than if bonds were to be issued for general corporate purposes, for the method of borrowing in the case of judgments is specifically set forth in the statute.

On this point the Supreme Court, in deciding the Stone case, said (p. 503):

“The sections of Article 7 above referred to pertain to the annual expenditures of cities, and a method is provided therein whereby funds may be raised to meet the temporary pressing financial wants of such municipalities by a system of short loans, which in no event shall extend beyond the close of the next fiscal year. *Those sections do not, in express terms or by implication, refer to or limit the powers of cities to borrow money on twenty-year bonds, conferred upon such municipalities by paragraph 5 of Section 1 of Article 5 of the City and Village Act, or by Section 1 of the act of 1865 as amended.* Neither is the power to make the temporary loans provided for in Article 7 inconsistent with the powers conferred upon cities under said other legislative enactments to make long time loans and issue bonds therefor, *and from a consideration of all the legislation upon the subject it seems plain that cities have the power to issue twenty-year bonds for the purpose of obtaining funds for corporate purposes, and with which to raise money to retire outstanding bonds issued by or other indebtedness from such municipalities, and that Section 3 of Article 7 of the City and Village Act contains no limitation upon those powers, but that such powers are as full and complete as though said Section 3 was not in force.*”

The words we have italicized in the above quotation state the proposition we have set forth in express terms. We have heard it said that these words were not necessary in making the decision and that they must be regarded as dictum. But we do not agree with that contention, for to us they appear to be a necessary part of the decision, especially in view of the fact that the court goes on after saying what we have reprinted above to quote copiously from other decisions which involve the very point at issue here.

Thus the court says (p. 503):

“In the case of *City of Huron v. Second Ward Savings Bank*, 30 C. C. A. 38 (86 Fed. Rep. 272), one of the objections made to a recovery upon the bonds sued upon was that the power granted by the charter to the City Council to pay current expense warrants of the city by a tax levy implies the exclusion of the power to refund such warrants by the issue of negotiable bonds. The court

said: 'The contention would be worthy of serious consideration if the express power to issue negotiable bonds was not also granted to the City Council by this charter; but the charter grants to the council authority 'to appropriate money and provide for the payment of the expenses and indebtedness of the corporation,' and gives it both the power to levy taxes and the power to borrow money and issue bonds for this purpose. It cannot be that the grant of either of these powers excludes either, and the choice of the method by which the indebtedness of the city should be paid is left to the discretion of the Council.' "

The court in the same case quotes approvingly from *Taylor v. Thompson*, 42 Ill. 9, where it was held that a tax for a corporate purpose was "one to be expended in a manner which shall promote the general prosperity and welfare of the municipality which levies it;" also from *Nat. Life Ins. Co. v. Mead*, 13 S. Dak. 37, from which, after saying that the language of the statute was identical with ours, it adopts the following (p. 505):

"The statute expressly makes the power to issue bonds co-extensive with the power to borrow money. Either may be exercised for any corporate purpose, and the payment of legal municipal debts is clearly a corporate purpose. If a city has power to borrow money by issuing bonds for the purpose of lighting its streets, it clearly has power to borrow money in the same manner to pay an indebtedness incurred for the same purpose."

Again, quoting approvingly from the City of Huron case, the court says (p. 505):

"Another objection to these bonds is, that the City of Huron was without power to issue them. The position is not entitled to extended consideration, because the power granted by the charter of the City of Huron is plenary. It was general—not special. It was not limited to specific purposes, but was to borrow money and issue bonds for all municipal purposes."

Other excerpts from the Stone case could be quoted to strengthen our position. In our opinion the case is so strong on the point at issue that we would have no hesitation in saying that it is absolute without quoting at length from it, were

it not for the fact that we are passing on a question of such vital importance that we feel bound to point out the words that seem to remove the doubt that has been so persistently urged whenever the question of issuing bonds for general corporate purposes has come up.

No decision expressing a contrary view from that in the Stone case has come to our notice in this state. The authorities in other jurisdictions are not entirely harmonious on the point at issue, but there are many which sustain our position.

Commonwealth v. Pittsburgh, 41 Pa. St. 278.

City of Richmond v. McGirr, 78 Ind. 192.

Morris v. Taylor (Oregon), 49 Pac. 660.

Rogan v. Watertown, 30 Wis. 257.

City of Pierre v. Dunscomb, 106 Fed. 611.

In presenting this matter we have spoken of doubts urged by others. Our reason for doing so is that we are constrained to say that our views are not entirely in accord with the views of others whose opinions on such matters we regard very highly.

It may be that bonds issued for general corporate purposes to pay current expenses will not find as ready a sale as other bonds of the city. But we find in discussing these matters with parties who do not entirely agree with us, that they admit that our position is logical, they admit that we interpret the Stone case correctly, and they admit that the decision in that case has not been overruled by later decisions. We therefore believe that contrary opinions are based on the theory that the Supreme Court will reverse itself and take a different position than in the Stone case if the question is presented to it; but in our opinion better ground exists for the belief that the Supreme Court will stand by the doctrine it has laid down, and in any event it is now the law in this state.

After a full consideration of the objections that have been freely made to the issuance of bonds for general corporate purposes and a study of the authorities cited against the propositions passed on in the cases we have cited in support of our view, we are of the opinion that the right to issue bonds

for corporate purposes expressly conferred by statute includes the right to issue such bonds for general corporate purposes in order to defray current expenses.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Salary of Chief Justice of the Municipal Court.

February 19, 1920.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

Your committee has before it an order referred to it by the City Council directing the committee to make a thorough investigation of the charge that the chief justice of the Municipal Court has illegally drawn the sum of \$15,000 from the city treasury and to recommend what steps should be taken to compel restitution, and you have asked for an opinion in the matter.

In response to your request we submit the following:

The said charge arises from the fact that on November 29, 1912, the City Council passed an ordinance changing the salary of the chief justice from \$7,500 per annum to \$10,000 per annum. (Council Journal, p. 2523.) The said ordinance was passed after the chief justice had been elected to serve a second term, such election having taken place on the first Tuesday of November. The increased salary was paid during Chief Justice Olson's second term, amounting to \$15,000 additional for the term.

On December 14, 1912, Wm. H. Sexton, corporation counsel, held that in view of the fact that the ordinance in question was passed by the City Council on November 29, 1912, approved by the mayor November 30, 1912, and that the re-elected chief justice did not enter upon his second term until December 2, 1912, that the said ordinance did not come within

the prohibition of Section 11, Article IX of the Constitution of this state providing as follows:

“The fees, salary or compensation of no municipal officer who is elected or appointed for a definite term of office shall be increased or diminished during such term.”

The Supreme Court of this state has never had occasion to pass directly upon the question here involved. However, a very similar question arose in the case of *People v. Sweitzer*, 280 Ill. 436, where certain judges sought to have writs of *mandamus* directed to the county clerk commanding him to draw warrants for the amounts of salary to which the judges claimed to be entitled by reason of an act of the General Assembly of June 24, 1915, increasing the salaries of the judges of the Circuit and Superior Courts of Cook County thereafter to be elected or who had been elected but whose terms of office had not yet commenced. The judges were elected at an election held June 7, 1915. The act in question was passed June 24, 1915, and went into effect July 1, 1915. The judges did not qualify or assume their offices until some time subsequent to the 13th of July, 1915.

The court held that in this case the relators were not entitled to the increase provided for by the Act of June 24, 1915, because the terms of office of the judges began to run from the date of their election, to wit, June 7, 1915, and that therefore the constitutional provision regarding the increase of salaries during terms of office prevented the statute from authorizing an increase in the salaries of the relators.

But the court did not base its decision upon this point alone. At page 442 the court used the following significant language:

“The constitution expressly prohibits the Legislature from increasing the salaries of circuit judges, and, in fact, of all state officers, during the terms for which they are elected. The theory of the framers of the constitution was to make the three branches of government, the legislative, executive and judicial, separate and independent of each other, as far as possible. The power to fix the salaries of state officers is in the legislative branch of the government, the duty to enforce acts of the Legislature is in the executive branch, and the power to construe the

acts of the Legislature is in the judiciary. The acts of the officers of each branch, while such officers are in power, should not be made to depend upon or be influenced by the acts of another branch, nor should there be anything in the conduct of either that would even give rise to a suspicion of such a thing as coercion by reducing salaries or a reciprocal interchange of favors by increasing salaries, hence the reason for the constitutional provision putting it beyond the power of the Legislature to increase or diminish the salaries of state officers in office and in power. This is fully borne out by the Debates and Proceedings of the Constitutional Convention as reported in Volume 1, pages 1015, 1018, 1019, 1020, 1058 and 1059, in which the practices which had theretofore obtained in securing, or attempting to secure, increases in salaries by certain state officers were set forth forcibly and at length. *It must be conceded, on principle, that there is just as much reason for a constitutional provision prohibiting an increase in the salaries of officers who have been elected to office and who are sure of holding office but whose terms have not commenced, as there is prohibiting an increase in salaries of those actually in office.* The relators in this case had been elected before the bill increasing their salaries was passed by the Legislature, and as to them and their associates elected at the same time it must be said that such enactment is clearly and unmistakably contrary to the spirit and intent of the constitution. But its application to relators does not depend on that point, alone."

In an additional opinion by Judge Carter, appearing at page 460, *et seq.*, the judge said at page 461:

"I agree that any reason that would justify forbidding a change in the salary of a judge after his term began would logically apply to an increase in such salary after a judge was elected."

This expression of the Supreme Court, in our judgment, has cast such a doubt on the soundness of the opinion of the corporation counsel dated December 14, 1912, that, in order to avoid criticism for non-action in a doubtful case, it is our opinion that the question should be submitted to the court for an authoritative decision as to Chief Justice Olson's right to

receive the additional \$15,000 during his second term as chief justice.

Yours very truly,
MORTON S. CRESSY,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Adjustment of Price on Coal Contracts.

February 19, 1920.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.
Dear Sir :

In response to your letters concerning adjustment of price of coal and the letters of the Bureau of Engineering which you sent along therewith we submit the following :

It appears from information before us that you have two forms of contracts for coal. One of these relates to the supply of coal to pumping stations and power plants, the other to the furnishing of coal to the city's fire stations and other activities wherein the city is divided into districts. The latter contract, for convenience, will be spoken of herein as the district contracts.

Both of the contracts referred to above contain the following clause :

“FUEL ADMINISTRATOR'S ORDERS :

“THAT: All clauses and agreements herein are subject to all present and subsequent orders of the U. S. Fuel Administrator or any other agency that may be established by the United States Government for the purpose of regulating the coal industry and the same shall apply to both parties.”

The principal difference between the two contracts lies in the fact that in the district contracts payment is based on the price per ton while in the pumping station and power plant contracts the payment is based on tests for determining the number of British thermal units in a given quantity of coal. Besides this difference there is also contained in

the contracts for pumping stations and power plants the following section:

“X.

“MINERS’ WAGE SCALE AND FREIGHT RATE:

“THAT: Should the freight rate from mine to destination be increased above or decreased below the scale in force on the day of opening bids, there shall be added to or deducted from the price paid to the contractor an amount equivalent to such increase or decrease, expressed in cents per ton.

“THAT: Should the wages of the miners or allied trades employed in the contractor’s mines specified herein, be increased above or decreased below the scales in force on the day of opening bids, there shall be added to, or deducted from the price paid to the contractor, an amount equivalent to such increase or decrease. The contractor must make claim, within 30 days after such change in wages or freight rate has become effective and furnish proof satisfactory to the commissioner of public works of said increase in wages or freight rates, and must also furnish the city any and all facilities to prove a decrease in wages or freight rates.

“THAT: Such addition or deduction due to change in wages or freight rate will be applied only to such coal shipped from the mines after the change in wages or freight rate has been made.”

Owing to the fact that the activities of the United States Fuel Administration were resumed at the time of the recent coal strike questions have arisen concerning the price to be paid in settlement of coal delivered within the last few months.

By an executive order dated October 30, 1919, rules, regulations, orders and proclamations relative to prices of bituminous coal which were contained in the order dated June 29, 1918, addressed to the coal dealers in Cook County, were put into effect. They remained in effect, however, only until November 13, 1919, when the following order was issued by the U. S. Fuel Administrator:

“Washington, D. C., November 12, 1919.

“THE UNITED STATES FUEL ADMINISTRATOR, acting under authority of an executive order of the president of the United States, dated 23 August, 1917, appointing

said administrator, and of subsequent executive orders, and in furtherance of the purpose of said order and of the Act of Congress therein referred to and approved August 10, 1917,

“HEREBY ORDERS AND DIRECTS that the executive order dated October 30, 1919, restoring certain rules, regulations, orders and proclamations relative to prices of bituminous coal and lignite, and the margins and profits of middlemen and wholesale and retail dealers in bituminous coal and lignite shall not be applicable to bituminous coal shipped on or after November 13, 1919, under a *bona fide* contract enforceable at law, entered into prior to October 30, 1919, and coal shipped under any such contract and diverted in transit, shall be paid for by the party receiving the same, at the price at which the shipper would be entitled to bill the same to the original consignee thereof.

“The regulation of said administrator dated January 17, 1919, entitled ‘Regulations relative to the Making of Contracts for the Sale of Coal or Coke by Operators, Jobbers, Sales Agents or Purchasing Agents of Coal or Coke,’ and the order of said administrator dated January 14, 1918, relative to the price to be paid for coal by the divertee in case of diversion, as amended by the order of said administrator dated November 20, 1918, and each of them is, hereby suspended in so far as said regulation and order, or either of them, is inconsistent with this order.

H. A. GARFIELD,

United States Fuel Administrator.

“By CYRUS GARNSEY, JR.,

“Assistant United States Fuel Ad.”

Later there was a settlement of the strike and the orders of the U. S. Fuel Administration again became inoperative and the rights of the respective parties to the contracts became again fixed by the terms of the contracts.

From conversations which the writer had with Mr. Combs, city engineer and with Captain Healey, engineer of contracts, it appears that you desire us to point out the rules which shall prevail in the adjustment of accounts of the coal dealers and also to pass on the question of what must be added to the contract price in order to conform with the rates allowed under the fuel administrator’s order of June 29, 1918. Mention is

also made in your letter concerning tentative claims or demands of public works contractors growing out of the increase in the cost of coal.

The whole situation presents itself in seven different aspects which we will take up seriatim in the following order :

1. Payment under the original contracts before October 30, 1919.

2. Payment at prices fixed by the U. S. Fuel Administration from November 1 to November 12, 1919.

3. Prices for coal diverted from the original consignees to the city's use from November 13, 1919, to time of the settlement of the strike.

4. Prices for coal that was not diverted but was delivered to the city direct under contract from November 13, 1919, to time of the settlement of the strike.

5. Price of coal after the settlement of the strike under the contracts of the city for coal for pumping stations and power plants.

6. The price of coal under the city's district coal contracts after the settlement of the strike.

7. The tentative demands of public works contractors and the way these will be affected.

We understand, of course, that included in the above there are some things about which you are having no difficulty whatever, but we deem it advisable to take up each of the items mentioned separately in order that there may be no mistake made in arriving at our meaning concerning those matters on which you desire advice.

1. *Payment under the original contracts before October 30, 1919.*

The original contracts controlled as to all coal delivered up to the time of the resumption of the activity of the U. S. Fuel Administration on October 30, 1919. As we understand it the order issued on that date went into effect on November 1, 1919, consequently all bills prior to November 1, 1919, are to be settled on the basis prescribed in the original contracts concerning which you are fully informed. The only thing in addition that we may mention in respect to these contracts is that the clause relating to the fuel administrator's orders does

not necessarily conflict with the section in regard to "Miners' Wage Scale and Freight Rate." It may sometimes do so but where the orders of the fuel administrator do not affect the price of coal to the consumer the question of the rate of payment is not affected. We do not understand that there is any dispute or difficulty about bills rendered up to November 1, 1919.

2. *Payment at prices fixed by the U. S. Fuel Administration from November 1 to November 12, 1919.*

The rule of the U. S. Fuel Administration authorized a price to the contractors which included the price paid for such coal on cars at the pit mouth, to which must be added the established freight rate and a fixed amount for overhead handling and hauling charges. The gross margin for truck hauled mine run coal was fixed as \$1.85 per ton, consequently under the orders of October 30, 1919, and the subsequent order which we have set forth above dated November 12, 1919, the city owes to coal contractors who delivered coal that was shipped from November 1 to November 12 inclusive, the cost of same on cars at the pit mouth, plus the established freight rate, plus \$1.85 per ton for truck hauled coal, and in the case of carload deliveries such amount as is shown by the order for that class of deliveries.

3. *Prices for coal diverted from the original consignee to the city's use from November 13, 1919, to time of the settlement of the strike.*

Such coal as was diverted from the original consignees to the use of the city during the period commencing November 13, 1919, and ending with the settlement of the strike must be paid for, under the terms of the fuel administrator's order of November 12, 1919, at the price which the shipper would be entitled to bill the same to the original consignees thereof upon presentation of satisfactory proof on his part in support of his claim. While such price may amount to more than the city's contract would call for, it must be remembered that such coal as was thus diverted was taken by the city on account of its extraordinary needs, and in justice to the shipper as well as in pursuance of the express order of the fuel admin-

istrator it must be paid for at the price which the shipper would otherwise have obtained.

4. *Prices for coal that was not diverted but was delivered to the city direct under contract from November 13, 1919, to time of the settlement of the strike.*

Such coal as was delivered to the city during the period commencing November 13, 1919, and ending with the settlement of the strike on the regular contracts of the city, that is to say, such coal as was not diverted but came in pursuance with the agreement between the city and the coal contractor, should be paid for at the regular contract price. The reason for this is that as to such coal the city was the original consignee and therefore it will pay the price that the shipper would get from the original consignee.

5. *Price of coal after the settlement of the strike under the contracts of the city for coal for pumping stations and power plants.*

All coal delivered under the contracts for pumping stations and power plants after the settlement of the strike will have to be paid for at the contract price with the addition for increase of wages of miners as provided for in Section X of the contracts, that is to say, that although settlement was made with the proviso that the mine owners would have to absorb the increase, nevertheless such provision cannot override the express provision in the contract which contemplates such an increase when the wages of miners are increased.

6. *The price of coal under the city's district coal contracts after the settlement of the strike.*

In the case of the district coal contracts where no express provision is made for an increase in case of a raise in the scale of wages of the miners, coal delivered to the city thereunder since the settlement of the strike, is to be paid for on the same basis as before the settlement of the strike, that is to say, the contract is resumed on the same basis as it was being carried out before the fuel administration issued its order of October 30, 1919. The fact that the increase was specifically provided for in the contracts for pumping stations and power plants does not affect the district coal contracts.

7. *The tentative demands of public works contractors and the way these will be affected.*

With regard to the demands of certain public works contractors for increased compensation due to the fact that coal cost more during the war and since then, we do not believe that the adjustment with the contractors of the city will affect the situation in the slightest degree. There is nothing either in the attitude of the Federal Government towards contractors for public works nor in the city's contracts with the coal dealers which can be taken advantage of by such public works contractors. In any event every one of the cases where claims of this kind are made must stand on the conditions and circumstances that prevail in the individual case. If it is necessary for us to pass on any of these we will do so when the time arrives for adjusting them.

We believe the foregoing covers all that you have asked us about, and that you will be able to make a fair and satisfactory adjustment with the coal contractors by following out the recommendations that we make.

We return herewith letter from Treasury Department of the Federal Government dated January 5, 1920, two copies of the fuel administration orders and two forms of contracts which you submitted to us.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Revocation of Broker's License for Rent Profiteering.

February 27, 1920.

HON. ROBERT J. MULCAHY, Chairman Committee on Rent Profiteering.

Dear Sir:

On February 21, 1920, your committee referred to the corporation counsel for appropriate action the question as to the

revocation of the license of Hendricks & Luken, real estate brokers, against whom charges were preferred before your committee by Howard F. Leopold and Ernest Block, who represented to your committee that they engaged in negotiations with the brokers for leases, and that during said negotiations the following situation developed:

Mr. Leopold was at the time paying a rental of \$85.00 per month. He claims that he was notified by Hendricks that his rent would be raised from \$85.00 to \$110.00 per month and when he called at Hendricks' office to sign the lease he was informed that he would have to give to Hendricks a check for \$60.00 and sign a lease for \$105.00 per month.

Mr. Ernest Block, whose rent at the present time is \$70.00 per month, was notified that his rent would be raised to \$95.00 per month, and when he called at Hendricks' office he was obliged to sign a lease for \$90.00 per month and give a check for \$60.00.

Both Mr. Leopold and Mr. Block were willing to pay the \$60.00 demanded by Mr. Hendricks, provided it was put in the written lease between them and the landlord, but Mr. Hendricks refused to put it in the lease and insisted on having a check made out in the name of his firm because the broker declared that he would not deliver the lease until such money was paid to him by the tenant. So far as appeared in any testimony presented, this was done by the broker without any authority from or knowledge of the landlord.

Your committee examined the witnesses and heard the testimony so far presented in this case. We believe an opportunity should be given to the accused broker to present his side of the controversy. If, after all the evidence is presented, you should be of the opinion that the facts are as represented by the said Leopold and Block, we believe that your committee should make a finding to that effect and forward it to the mayor, in whom resides the power to revoke licenses, together with the evidence on which the same is based with a recommendation to revoke the license of said real estate brokers if your honorable committee deems that the license ought to be revoked under the circumstances.

The mayor, in a case of this kind, may revoke a license for cause. While the authorities are by no means agreed on the subject, we are of the opinion that such a course of conduct on the part of real estate brokers as above outlined, and which is uncontradicted and undenied, would be sufficient legal cause for a revocation.

Yours very truly,

MORTON S. CRESSY,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Bridge Designing for Board of Local Improvements.

March 9, 1920.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

In your letter of March 3, 1920, you submitted a recommendation of the city engineer and drafts of three tentative orders which have for their object the employment of engineers, designers, etc., for the large improvements now under way in such manner that they can be paid in the first instance out of the bridge division capital account, which is then to be reimbursed from the proceeds of bonds issued for such improvements.

The precise question you ask is whether there is any legal objection to a plan by which the work of designing of bridges will be done for the Board of Local Improvements, without competition, on requisitions which are to be honored by the Bureau of Engineering by drawing on its capital account and then rendering warrants for collection against a certain appropriation that would be set up from the bond issues in the appropriation for the Board of Local Improvements.

We do not think that the plan proposed will do violence to the purport and meaning of the statute governing the making of local improvements. Under Section 83 of that act, such board is given authority to employ an engineer and such as-

sistant engineers, clerks, inspectors, etc., as may be necessary to carry into effect the purposes of the act. Clearly, it is contemplated that the work of designing should be done by the board and that it is not necessary for it to let contracts for this class of work. Hence, so far as competitive bids are concerned, we do not regard them as essential, since no contract would be let.

The authority to design such bridges being vested in the Board of Local Improvements, and it being given the right to employ engineers and other employees for that purpose, the only question that can arise is whether the persons employed in the bridge division under the capital account there established would, in effect, be employees of the Board of Local Improvements. In our opinion, if such an appropriation as is proposed, viz., an account for personal services for bridge designing, is set up for the Board of Local Improvements in the appropriation bill, it would have the right to designate as employees to be paid therefrom such engineers, designers, draftsmen, etc., as work on this class of work in the bridge division of the Bureau of Engineering of the city.

We do not believe that if this matter were to be inquired into by a court, it would go to the extent of insisting that, where the same kind of work is required in another department, there should be such a direct employment by the Board of Local Improvements as would necessitate dividing the forces of the city so that a part of them would be directly under the control of the Board of Local Improvements and another part under the control of the commissioner of public works.

We, therefore, believe that if the Board of Local Improvements finds it desirable or advantageous to employ the forces of the bridge division of the Department of Public Works for the purpose of designing bridges, it would be proper to enter upon a program such as is outlined by the three proposed orders. We beg to call your attention, however, to the fact that the order of February 5, 1920, making provision for the employment of the necessary engineers, designers, etc., by the Board of Local Improvements was not vetoed by the mayor

and that, if such a program is decided upon, this would have to be repealed before the three new orders are passed.

We further call your attention to the fact that the passage of these orders will authorize such work only until such time as the regular appropriations are made. The appropriation bill should contain the authority for the employment of the persons that you desire as shown in Order No. 2 submitted to us; it should also contain an enlarged capital account for the bridge division with authority to lease office and floor space, as indicated in your Order No. 3. The appropriations for the Board of Local Improvements should also be drawn in such a way that the personal account above referred to is set up so that it can be drawn on in the regular course of business.

If the formalities indicated above are observed, there would be no legal objection to putting into effect the plan you propose. We return herewith letter of city engineer and the three orders mentioned, retaining only one copy of each of these.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Reservation Clause in Contracts.

March 11, 1920.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

We are in receipt of the letter of the city engineer dated March 9, 1920, in which he refers to several conversations relative to the insertion of a reservation clause in contracts by which the contractor is protected against loss in case of fire, strike, flood or other contingency, which, it is stated in the letter, would be the means of saving money to the city on bids offered for material and work if adopted as a part of the contract.

The city engineer in his letter also submitted a form used on the Standard Oil Company quotation sheet and a form used by the American Bridge Company in making contracts, and finally suggested for our approval a paragraph covering the matter which specifically places the burden of proof upon the contractor and allows no modification if there is an extension of the contract at the request of the contractor, but which otherwise is substantially the same in effect as the Standard Oil Company's form.

We, of course, do not make any recommendation as to the policy of adopting such a provision in the contracts made in your department. That is a matter that is left entirely to your discretion and could only be controlled by an ordinance passed by the City Council. There is at present no ordinance which would prevent such a reservation being made in contracts, and if you see fit to adopt this policy you have the right to do so.

We are not entirely satisfied with the form suggested by the city engineer, and in place of the form that he sets forth in his letter we submit the following:

“It is mutually agreed that the contractor will perform the services required under this contract and specifications to the entire satisfaction of the commissioner of public works, and his obligation concerning the thorough and complete performance of the same shall only be modified in case of fire, strike, washout, storm, the intervention of the government, any act of God, or any other unforeseen occurrence beyond his reasonable control, to the extent that such unforeseen occurrence interferes with such thorough and complete performance, the burden of proof for any claim of exemption hereunder resting entirely upon the contractor, it being further mutually agreed that, if there is an extension of contract at the request of the contractor, such reservations as are herein contained shall not hold as a basis of claim for an exemption during any such extension.”

The clause quoted above would, in our opinion, more completely express the intention of the city engineer than in the form that he proposed it, and therefore if you adopt the pol-

icy of making such reservations we recommend the form that we have drafted.

Yours very truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Jurisdiction of City Council Over Election Contests.

March 15, 1920.

HON. A. J. CERMAK, Chairman Judiciary Committee.

Dear Sir:

We have received your letter of the 11th instant, requesting us to render an opinion as to the jurisdiction of the City Council in the matter of two petitions referred to your committee by the City Council, viz.:

1. A petition contesting the election of Alderman John Lyle at the election held in the 32nd Ward, February 24th. The petitioner contends that if the ballots are opened and recounted it will be shown that Ald. Lyle did not receive a majority of all the votes and that, consequently, a supplemental election would have to be held April 6th.

2. A petition requesting that the ballots cast for alderman at the election held in the 12th Ward, February 24th, be opened and recounted. The petitioner contends that if this is done it will be shown that he received more votes than Ald. Joseph I. Novak, who has been certified as one of the two men to be voted on in said ward at the supplemental election to be held April 6th.

With reference to the petition contesting the election of Alderman John H. Lyle of the 32nd Ward, we are of the opinion that the incoming City Council under Section 6 of Article III of the Cities and Villages Act has jurisdiction in the matter.

With reference to the petition requesting that the ballots cast for aldermen at the election held in the 12th Ward, Feb-

ruary 24 be opened and recounted, we are of the opinion that, under Section 14 of "An Act to amend an Act entitled, 'An Act to provide for the incorporation of cities and villages,' approved April 10, 1872, in force July 1, 1872, by amending Article XII thereof by adding thereto twelve new sections to be known as Sections 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of Part Four," approved June 28, 1919, in force July 1, 1919 (commonly known as the non-partisan aldermanic election law) which provides that all laws in force in the City of Chicago governing elections for municipal offices or applicable thereto and not inconsistent with the provisions of this act shall apply to and govern all elections held under the terms of this act, places jurisdiction of this contest in the hands of the County Court or in the judge thereof in vacation, or in the Circuit Court, or in the judges thereof in vacation, as the case may be, as provided in Section 62 of an act entitled, "An Act in relation to the nomination of candidates for public offices by political parties," approved June 28, 1919, in force July 1, 1919 (commonly known as the Primary Law) inasmuch as said act would be applicable to the nomination of aldermen in the City of Chicago had not the non-partisan election law become effective, and as no provisions in that act conflict with Section 62 of the primary law.

Respectfully submitted,

G. A. DAHLBERG,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Frontage Consent for Undertaking Establishment.

March 25, 1920.

HON. JOHN DILL ROBERTSON, Commissioner of Health.

Dear Sir:

We are in receipt of your communication in re application for license to conduct an undertaking business at 1411 E. 60th street, Chicago, Illinois,

Section 1238 of The Chicago Code of 1911, page 461, provides as follows:

“§ 1238. FRONTAGE CONSENTS.) It shall be unlawful for any person to carry on the business of an undertaker, as defined in this article, who, in connection with such business, receives at his place of business the body of any dead person, for embalming or other purposes, where such place of business is located on any street in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, without the written consent of a majority of the property owners according to the frontage on both sides of such street in such block; provided, however, that nothing herein contained shall apply to persons licensed as undertakers at the time of the passage of this ordinance.

“Such frontage consents shall be obtained and filed with the department of health before a license shall issue for such business.”

The premises above referred to are in the block between Blackstone and Dorchester avenues. There are three buildings only in this block, all on the south side of the street, viz., the Burns apartment building which is used partly for business on the first floor, the Roberts building, in which the business in question is proposed to be located, and the building on the southeast corner of Dorchester avenue and 60th street, the old World's Fair apartment building. The north side of 60th street, between Blackstone and Dorchester avenues, has no improvements whatever.

Since two-thirds of the buildings on both sides of the street are not used exclusively for residence purposes, it follows that it is not necessary to obtain the written consent of a majority of the property owners according to the frontage on both sides of such street in any such block, as required by the ordinance. We, therefore, are of the opinion that a petition is not required in this case.

Yours very truly,

CHARLES W. BIDWILL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Status of Director of Foods, Markets and Farm Products.

April 3, 1920.

HON. JOHN DILL ROBERTSON, M. D., Commissioner of Health.
Dear Sir:

In reply to your inquiry concerning the status of the director of foods, markets and farm products, in view of the fact that no appropriation has been made for him in the annual appropriation bill which was just passed by the City Council, we submit the following:

The office in question was created by an ordinance, passed July 7, 1919 (Council Journal, pages 698 to 700, incl.), that provides for the appointment of said officer by the commissioner of health from an eligible list prepared by the Civil Service Commission, which was required to hold a special competitive examination. There was no term of office provided in the ordinance but the salary was fixed in Section 1493G, which is as follows:

“The annual salary of the director shall be five thousand dollars per year. The salaries of all other officers and employes of the bureau shall be fixed and provided by the City Council. The City Council shall provide by appropriation the necessary expenses for the bureau.”

It will be seen from the above that the office was created by an ordinance which was entirely distinct and independent from any appropriation ordinance. It, therefore, stands, from a legal point of view, in the same position as did the office of superintendent of the Bureau of Social Service, created by the ordinance establishing the Department of Public Welfare, which the Supreme Court passed on in the case of *People ex rel. Blachly v. Coffin*, 279 Ill. 401.

The court in that case held that the office of superintendent of the Bureau of Social Service became fixed by the ordinance which established the department and prescribed the duties of the office. The court stated that the ordinance sufficiently indicates the intention of the council to start the department at once, with two bureaus, under the direction of a superintendent of each, and that, “these offices were not left

to be provided for or prescribed in the future by the Council but were then created by the ordinance itself."

This is strictly in line with opinions which we have given from time to time to the effect that the only function of the annual appropriation bill is to set apart funds for municipal activities, and that it can not be used as a vehicle for effecting other legislation, such as abolishing a department or bureau that has been regularly established by ordinance. Where an office, or bureau, or department, is once created by an ordinance that is independent of the annual appropriation bill, the mere failure to appropriate funds for it does not operate to repeal the ordinance creating same. It is the duty of the City Council to make provision for it in the appropriation bill. Its failure to do so may result in preventing the proper functioning of such officer, bureau or department, but not to abolish same. Therefore, when there is such an omission of duty it becomes necessary to ascertain how far the particular activity may go on under the authority that exists aside from the appropriation bill.

In the present instance the position of director of foods, markets and farm products is somewhat stronger than the status of the officer whose rights were passed on in the case cited, because in this instance the City Council actually fixed the salary, and therefore the question of how much to pay him does not depend upon the appropriation bill, and the only question is how long this salary is to be paid. The question of the amount of the salary would only depend upon the appropriation bill in case there was a change made in the salary, in which event the new salary fixed would conflict with the original ordinance and would prevail as the later expression of the City Council.

Until the decision in the Blachly case was rendered we always understood the law to be that a person could not be regarded as an officer and entitled to his salary regardless as to whether an appropriation was made or not unless the office was created in pursuance to Section 2 of Article VI, of the Cities and Villages Act.

But the decision of the court in the Blachly case is a

departure from this view, because it expressly rules that such a position as the one in question is actually an office with practically the same standing as if created under that section, although filled by competitive examination and with no definite term. In pursuance of this decision we held, with reference to certain offices in the Department of Police, that the incumbents were entitled to salary when they continued to perform the duties of their offices although no appropriations were available. (See opinion for general superintendent of police under date of July 11, 1919.) We based this opinion on the following cases in addition to the Blachly case:

Fitzsimmons v. O'Neill, 214 Ill. 494.

Corrigan v. Mayor, etc., 149 N. Y. 225.

Kucharski v. Harrison et al., 264 Ill. 563.

Here again, the only difference between the cases thus passed on last year by us and the one under consideration is that in the present instance the salary is fixed by ordinance, while in the case of the officers therein mentioned they stood in precisely the same position as the officer in the Blachly case.

When the salary and the term are both fixed by an independent ordinance, the obligation to pay the officer for the balance of his term is absolute unless the office is regularly abolished by a legislative act of the City Council independent of the appropriation bill.

When there is no fixed term the obligation to pay rests on the service performed.

Since writing the opinion above referred to last year our position has been strengthened by an intimation in a later case (*People ex rel. Jacobs v. Coffin*, 282 Ill. 599-613), to the effect that where a position is created by the making of an appropriation for same, only the amount that is thus appropriated can be claimed by the person entitled to the position. The inference to be deduced therefrom is, that where the office is created by an independent ordinance and the salary is fixed, such officer would be entitled to the pay fixed by the ordinance creating the office while he performed such duties.

Our view of the case, therefore, is that the director of foods, markets and farm products is, for the present, entitled

to the salary fixed by ordinance. This is certainly true with respect to the time that elapses before the appropriation ordinance becomes effective; and we believe that it will have to continue while the food bureau ordinance remains in force. We have no doubt that if he continues to perform the duties of the office he can recover for the salary even though no appropriation was made for same.

Yours very truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

“Traction Fund” as Used in Appropriation Bill.

April 6, 1920.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

You referred to us a letter from the city comptroller calling attention to the use of the words “Traction Fund” in the annual appropriation bill for 1920 which has passed the City Council and is awaiting the approval of the mayor.

The comptroller states that there is no such thing as a “Traction Fund,” but that there are two separate funds of unequal amount which together comprise what is popularly called the “Traction Fund.” You call attention to the fact that the words were so used in last year’s appropriation bill and ask whether it would be incorrect to use them again in the same way.

Strictly speaking, the comptroller is correct in saying that no official title of “Traction Fund” has ever been given the combined fund under consideration. It would perhaps be better to distinguish between the two funds and describe them separately as “Deposits of Chicago City Railway Company under ordinance of February 11, 1907,” and “Deposits of Chicago Railways Company under ordinance of February 11, 1907.” That was the practice in former years, and we recommend that it be followed in the future.

We do not believe, however, that the failure to do so in the present instance will result in any difficulty, and we do not regard it necessary to change the wording of the appropriations in the ordinance that has passed the City Council.

There is no official title for the fund or funds commonly called the "Traction Fund." The title that the comptroller suggests and which has been used is somewhat fuller from a descriptive point of view, but it carries no greater official sanction. The question to be determined is whether the intention of the City Council has been clearly manifested. If so, there is no invalidity in referring to the fund or funds as the "Traction Fund."

In fact that expression has received the sanction of the Supreme Court. In the case of *Barsaloux v. City of Chicago*, 245 Ill. 598, these funds are spoken of repeatedly as "the special traction fund" and as "the traction fund." There can, therefore, be no doubt as to the intention of the City Council, and, if such a doubt arises at any time in the future it will not be too late to cure the possible defect in subsequent appropriation bills.

We are consequently of the opinion that the appropriations from the traction fund are properly made.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Employees for Whom no Appropriations Were Made.

Chicago, April 6, 1920.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

We are in receipt of a written inquiry from the chief clerk in your office as to whether the passing of the appropriation bill operates to suspend automatically any employe not provided for therein and whether such suspension takes effect with the passing of the appropriation bill.

The inquiry is very plainly based on the theory that the appropriation bill for 1920 is now in effect. You understand, of course, that, while the City Council has acted, the appropriation bill is awaiting the approval of the mayor, and for the present, at least, it is not in force. If the status of the employes in question depended on the appropriation bill there would be no change with respect to them until the ordinance finally went into operation ten days after advertisement of same. But the status of these employes depends on something entirely different.

In contemplation of law there exists no authority to employ any one for the city, generally speaking, until the City Council has acted either by passing the annual appropriation bill or by authorizing temporary expenditures for which appropriations are to be made when the appropriation bill is passed. There are some exceptions to this, but as the question before us does not involve any of these exceptions we do not need to go into them.

Acting in pursuance of the law applicable to the situation, the City Council passed three separate ordinances authorizing expenditures before the passage of the annual appropriation bill. These were passed on January 2, February 5 and March 3. They are substantially alike, with only the changes in dates and amounts, and authorize expenditures for the months of January, February and March respectively. Neither of them contains any provision which authorizes any expenditure beyond the month for which it was intended.

The result is that the only authority which existed for the employment of persons occupying positions not provided for in the annual appropriation bill has expired by limitation. You have no further power to employ for such positions regardless of whether the annual appropriation bill has become a law or not.

It is true the same rule applies to the employment of those for whom provision was made in the annual appropriation bill, and under a strict, technical construction of the law, these are also at present employed without authority. However, since they have been included in the appropriations as

passed by the City Council, it is reasonable to assume that the positions thus provided for will have the sanction of authority before long.

With respect to the positions about which you inquire, you can justify a delay of a few days in laying off the men on the theory that there exists for the moment as much authority to keep them on as there exists for keeping on other employes and that no official notice to lay them off can be given to you at present, but unless the mayor, at the meeting to be held April 7th, vetoes the annual appropriation bill, or recommends changes which are adopted preserving the positions of which you speak, you would not be justified in retaining the said employes beyond the date of that meeting.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Excise Tax on Automobiles.

April 12, 1920.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

In your letter of recent date you state that the city purchased 19 automobiles from Wm. Erby & Sons during the years 1917 and 1918, and that these parties now claim the sum of \$1,526.95, which is said to be the war tax on same. You ask whether such claim should be allowed.

We do not believe the claim is justified, our opinion being that the War Revenue Act of 1917 did not require the payment of such tax on cars sold to the city and that the later Revenue Act did not apply in this particular to the year 1918.

In the law of 1917, the provision covering the matter in point was as follows:

“Sec. 600. That there shall be levied, assessed, collected and paid—

“(a) Upon all automobiles, automobile trucks, automobile wagons, and motorcycles, sold by the manufacturer, producer, or importer, a tax equivalent to three per centum of the price for which so sold; * * *.”

The question having arisen as to whether the tax was collectible from the city, we held that such tax could not be collected from a municipal corporation which was a political subdivision or agency of the state. This opinion was upheld by the ruling of the commissioner of internal revenue, as you state in your letter. Under the law of 1917 so much force is given to the administrative provisions that this ruling of the commissioner in itself was sufficient to exempt the city.

The War Revenue Law of 1918, which was passed in 1919 and which, so far as the tax on manufactured articles is concerned, did not go into effect until after its passage, contained the following provision:

“Sec. 900. That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

“(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), three per centum;

“(2) Other automobiles and motorcycles, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

“(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivisions (1) or (2), 5 per centum; * * *.”

You will note that there is a difference in the wording which gives color to the ruling of the commissioner of internal revenue of July 3, 1919, to the effect that under the later law the tax is to be paid by the manufacturer, producer or importer. We have, for the present, acquiesced in this ruling, although there is still a possibility of some further test of the law being made on this point.

We have taken the pains to show above the difference

in the wording of the two laws and the two rulings made by the commissioner of internal revenue, without analyzing the causes for the reversal of the ruling which he made under the first law, because we do not regard the question of whether he was right or wrong in either ruling as essential to a determination of the question you ask us, namely, the question of whether the later ruling is to be applied retroactively.

The question of whether the ruling is to be applied retroactively is absolutely settled by another section of the War Revenue Law of 1918. (Sec. 1312.) By that section, if the contracts made prior to September 3, 1918, did not permit the addition of the tax, the vendee is required to pay the tax. In other words, the contracts covering the period of which you speak, under this section of the law, would throw the tax on the municipality as the vendee—but since no tax can be imposed on the municipality, the tax can not be collected.

Hence, viewed in any light that it can be put, we do not think the tax claimed should be paid by the city.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Permits for Boiler Repair Work.

April 22, 1920.

HON. JOHN DILL ROBERTSON, Commissioner of Health.

Dear Sir:

We are in receipt of your letter of April 6, 1920, in which you inquire whether the Department of Health is authorized to issue a construction permit for boiler repair work to an applicant who underwent an examination and received a general license as a mason contractor under an ordinance passed March 26, 1918, and whether under Section 1423-F of The Chicago Code of 1911, he would be required to undergo another examination for the purpose of determining his quali-

fications and competency as a boiler setter.

The only part of Section 1423-F which we need quote for the purpose of this opinion is the first sentence, which reads as follows:

“Section 1423-F. No owner shall alter or repair any brick work on or about a high-pressure boiler without first submitting plans and specifications to the commissioner of health and securing a permit therefor, *and such work, shall be done only by one properly licensed therefor.*”

The gist of the amendment is that the ordinance now contemplates that before a person shall be given a license to alter or repair brick work on high-pressure boilers, the Department of Health must be satisfied that he is competent to do that kind of work.

Section 1423-F of The Chicago Code of 1911, would apply to an applicant who had not previously taken a general examination which included boiler setting as a test or an examination which tested his ability in boiler setting only, and consequently would be compelled to take an examination testing his ability in boiler setting. This information, of course, would be furnished by the board of examiners of mason contractors.

If an examination held by the board of examiners of mason contractors was of such a character that the board could determine an applicant's ability in all the recognized branches of mason work, and this examination included boiler setting, and the applicant received a license to do general mason work, then there would be no occasion for requiring another examination to determine whether a person who is operating under a general license is competent in setting boilers. If on the other hand, the general examination did not cover boiler setting, the applicant would be compelled to take an examination to test his proficiency in boiler setting. This would be true even if the applicant had a license to do general mason work.

It is for the board of examiners to say whether or not such examination was sufficient to test the ability of the applicant in all the different branches of the trade and whether it included the test for boiler setting.

I am therefore of the opinion that if the records of the board of examiners of mason contractors show that the applicant qualified in a general examination for mason contracting, which included the test for boiler setting, he would be entitled to a permit to set boilers without re-examination. If, however, the records do not show these things, but only show the general examination which did not include boiler setting, then he would not be entitled to a permit to set boilers.

Yours very truly,
THADDEUS F. KUFLEWSKI,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Liability of City for Damage to Automobile by a City
 Health Ambulance.**

April 26, 1920.

HON. JOHN A. RICHERT, Chairman Committee on Finance.
 Dear Sir:

Your communication of April 14, 1920, referring claim of J. B. Dibelka to this office, with the request that the matter be investigated and an opinion furnished your committee as to liability of the city in cases of this character, has been referred to me.

In the course of an investigation I have received a copy of a statement respecting this claim, made by Dr. Alexander Darche. He was present and in charge of Health Ambulance No. 5 at the time of the accident out of which this claim arises.

I herewith attach a copy of the statement of Dr. Alexander Darche, and return all papers received in reference to this claim.

It is a well settled principle of law that a municipal corporation and persons employed by it in the performance of a public service in which it has no particular interest, or receives no special benefits in its corporate capacity, but which

it is bound to see performed pursuant to the duty imposed by law for the general welfare of its inhabitants, act as public officers charged with a public duty. The doctrine of our courts seems to be that a municipal corporation is not responsible for the negligence of its agents in the performance of public duties.

City of Chicago v. Seben, 165 Ill. 371, pp. 377-8.

City of Chicago v. Williams, 182 Ill. 135, pp. 137-8.

Evans v. City of Kankakee, 231 Ill. 223, p. 227.

Tollefson v. City of Ottawa, 228 Ill. 134, p. 136.

“The performance of duties that relate to the preservation of public health and care of the sick is likewise of concern to the public as a whole; in executing this function the municipality and officers through whom it acts performs governmental or public duties; * * * for which there is no liability, and the officers or agencies engaged in the performance of such duties are public officers for whose torts the municipal corporation is not responsible.”

(28 Cyc. 9, 1305, and cases cited in the note.)

In the following cases, it has been held that a municipal corporation is not liable for injury occasioned by negligence of persons employed.

Love v. City of Atlanta, 95 Ga. 129. Action for personal injuries. Garbage wagon collided with buggy, causing injury to plaintiff.

Condict v. Jersey City, 46 N. J. L. 157. Suit to recover damages for the death of plaintiff by negligence of driver in the management of horse and ash cart owned by the city.

In the case of *Maxmillian v. N. Y.*, 62 N. Y. 160, the court, at page 163, held that:

“A city is not liable for the negligence of an employe of the commissioner of public charities in driving an ambulance belonging to the city which struck and caused the death of the plaintiff’s intestate.”

In *Conway v. Nashville*, 100 Tenn. 262, the court held that:

“The city is not liable for negligence of the driver of a sprinkling car in colliding with and overturning

a buggy, thereby injuring occupant. The employe in such a case is engaged in the performance of a governmental, not a mere ministerial, duty."

Cases in other jurisdictions might be referred to which hold that when a municipal corporation is engaged in the governmental duty of promoting the general health, it will not become liable for the negligence of those in performance of that duty.

I am, therefore, of the opinion that the city is not legally liable in the claim of J. B. Dibelka for damages to his automobile said to have been occasioned by collision with Health Ambulance No. 5.

Yours very truly,

CARL F. LUND,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Sale of Artificial Ice Without Weighing.

Chicago, May 8, 1920.

HON. MORRIS ELLER, Inspector of Weights and Measures.

Dear Sir:

In your letter of recent date you state that the manufacturers of artificial ice have requested that they be allowed to sell ice from their platforms at their places of business on Saturdays to consumers coming after the same without weighing it. They give as their reason for asking this that the rush of business on Saturday is so great that it would be a hardship to be compelled to weigh each individual piece. You ask for an opinion as to whether this concession could lawfully be made to these ice manufacturers.

Section 1296 of The Chicago Code of 1911 requires every person or corporation selling ice or offering ice for sale to weigh the same at the time of delivery. This applies to all sales. Avoirdupois weight must prevail unless there is a specific agreement to the contrary. This proviso permitting other

than avoirdupois weight does not permit the sale without weighing of some kind even by agreement. Hence, there can be no selling of ice on a particular day without weighing same unless this ordinance is changed. We assume your inquiry is directed to the possibility of amending the ordinance in such a way as to permit this.

While it would appear at first blush that there is an interference with the right of contract in preventing the consummation of a sale between two parties without weighing where both have agreed thereto, nevertheless the ordinance as it stands is within the police powers of the city. (40 Cyc. 882.) Such regulations are designed to protect the public, and to permit the sale of ice without weighing if the purchaser and seller agree that it should be sold otherwise would open the door to great abuse.

Since the ordinance requires weighing, and since this does not permit a separate agreement as to each sale at the times and under the conditions you name, it follows that weighing can not be avoided on Saturdays on the platforms of the manufacturers unless the ordinance is amended in some lawful way so as to exclude Saturdays' sales at such platforms from the provisions of same.

It would be rather a novel departure to provide that this ordinance should not be in effect one day of the week for a certain class of dealers at a certain place. There would have to be some reason for making this distinction, and it is doubtful whether a mere rush of business would be sufficient in law to constitute such a reason, because such a regulation is in fact more important when there is a rush of business than at other times.

If there were some reason for making the distinction there would be no legal obstacle in the way any more than there is a legal obstacle in providing that at certain hours vehicles may be parked at the curbs while at others they may not.

Again, if such a change were made in the ordinance it would have to include all who sell ice under similar conditions. It could not be confined to the manufacturers of artificial ice under any circumstances, but would have to include dealers in

natural ice, and it is more than probable that the courts would hold that drivers of ice wagons and all others who sell ice must be accorded the same privilege. It would at least be difficult to frame an ordinance which would avoid all discrimination and at the same time avoid the danger of gross abuse and fraud.

From the above you will readily gather our conclusion that, while it may be possible to draft such an amendment of the Code as you suggest, its validity will not be entirely free from doubt until passed on by the courts, and its practical effect may be to throw down the bars which are designed to prevent fraud and extortion.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Daylight Saving Ordinance.

Chicago, May 25, 1920.

HON. OSCAR H. OLSON, Chairman Committee on Judiciary.

Dear Sir:

Your letter of recent date, in which you ask for drafts of two separate ordinances concerning daylight saving, was referred to the undersigned for attention.

Your first request is for a daylight saving ordinance along the lines of the draft you submitted which is to be in effect from the second Sunday in June to the last Sunday in October of this year. We have prepared a new draft of this ordinance in the form you desire, and forward same herewith.

Your second request is for an ordinance providing for the submission to the voters, at the forthcoming September primary, of an ordinance for daylight saving in subsequent years.

With respect to this request, we beg to call your attention to the fact that the statutes authorize the City Council to submit to the voters for approval only certain classess of ordi-

nances, such as traction ordinances, bond ordinances and ordinances for the sanctioning of additional appropriations to be made after the time for the council to make appropriations has passed. By a familiar rule of construction, the enumeration of these ordinances as properly subject to a referendum excludes the submission of others that the statutes do not expressly authorize or require to be submitted.

Hence, the only way of submitting the question of daylight saving to a popular vote is to proceed under the public policy act of 1901. (Hurd, Ch. 46, Secs. 428-9.) In place of preparing an ordinance such as you suggest, therefore, we have prepared a resolution declaring in favor of a move to put this matter before the people as a question of public policy. We forward said resolution herewith, along with the redrafted ordinance above mentioned.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANK S. RIGHEIMER,

Acting Corporation Counsel.

Use of Streets for Tag Day Collections.

Chicago, June 1, 1920.

HON. OSCAR H. OLSEN, Chairman, Committee on Judiciary.

Dear Sir:

In your letter of recent date you ask whether or not the City Council has the legal power to permit or prohibit "tag day collections" on the public streets of the city.

The collections to which you refer contemplate the use of the streets by large numbers of persons who solicit contributions for charitable purposes from the public generally. It has been the practice to grant the temporary use of the streets for such purposes on certain days to certain organizations named in a Council order.

The city has wide police powers over the streets which will enable it to control the use of same to the same extent,

practically, as if the whole police power of the state had been delegated to it. But it holds these streets in trust for the use of the public, and the primary purpose of keeping them free from obstruction to public travel or interference with such travel must never be lost sight of.

The City Council may prohibit the use of streets for purposes of solicitation of this kind altogether if it sees fit, just as it has the right to prohibit hucksters and peddlers from pursuing their calling on the streets. (See *State v. Barbelais*, 101 Me. 512; *Commonwealth v. Ellis*, 158 Mass. 555.)

It is not often, however, that so extreme an exercise of the police power is indulged in. Sales on the streets by licensed peddlers are usually permitted under suitable traffic regulations which prevent such sales from becoming a nuisance. When so regulated, the business of hawkers and peddlers does not interfere with the free use of the street by the public.

It is doubtful whether a similar license can legally be issued for purposes of solicitation on the streets if the privilege extends over a period of time of any considerable length. That would not be granting an occupation license, and it would amount to an interference with the free public use of the street. It could not be justified on the theory that it was for the convenience of the public, as in case of selling newspapers or other goods and wares of peddlers. But it seems to be within the power of the City Council to grant such a temporary privilege for a very limited period, on the same theory that the use of the streets for public celebrations is justifiable. Some courts have held that there is a clear distinction between a public celebration and a private display or exhibition and have frowned on the practice of giving over public streets for private celebrations. Hence, the question before us is an exceedingly close one.

While this solicitation on the streets for charity cannot be regarded as for a public purpose in the strict sense of the word, yet it may be that the public reaps some benefit through being relieved to some extent of the burden that would be thrust upon it if the recipients of this private

charity were compelled to appeal to the public charities. Hence, we do not believe that the City Council would exceed its powers if it permitted the use of the streets for this purpose for a limited time under such restrictions as will prevent the creation of a nuisance.

On the other hand, if the Council sees fit to permit it, there is no legal way of granting the privilege to some and excluding others therefrom if they are of equal moral fitness. In other words, the law does not permit the City Council to designate certain societies that may have the privilege, as it has done in the past.

The rights of all parties to tag day privileges must be fixed by general ordinance, which is uniform in its application to all persons of the class affected. That is to say, the ordinance must impose the same restrictions on all who seek these privileges and must treat all persons alike when the application for the privilege is made. It would be unlawful to grant any special immunity or privilege to any particular person or association. *Cicero Lumber Co. v. Town of Cicero*, 179 Ill. 9; *People v. Clean Street Co.*, 225 Ill. 470.

Our opinion, therefore, is that the City Council may, by ordinance, fix certain days on which solicitation for charitable purposes shall be permitted on the streets of Chicago. The proper method of doing this, how to prevent the abuse of the privilege, how to avoid fraud, how to circumscribe the activities of the persons engaged so that it does not amount to a nuisance, are questions of policy and not legal questions. If there is such an ordinance passed it must not be so interpreted that a person will have the privilege of perpetrating a fraud or creating a nuisance.

Because of the varying character of these conditions, it is somewhat difficult to lay down a rule which will apply to all cases. It will doubtless be necessary for you to call upon us for opinions from time to time as specific cases arise.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Licensing of Pleasure Cars.

June 30, 1920.

HARRY D. PARKER, Esq., R. 3, City National Bank Building,
Kankakee, Illinois.

Dear Sir:

Replying to your letter of the 23rd instant, we beg to say that we do not quite catch your point when you state that it was not the intention of the Legislature to allow cities to license pleasure cars. The law of 1919 limits the amount of such license fee but does not prohibit it.

The Supreme Court rendered its decision in the case of *City of Lincoln v. Dehner*, 268 Ill. 175, in which it held that cities had no right to impose such license fee on automobiles, on June 11, 1915. The Legislature was at that time in session, and in order to save the city's wheel tax, we immediately prepared an amendment to Section 12 of the Motor Vehicle Act of 1911 (See Laws of 1915, pages 592-3). This amendment was passed and went into effect on July 1, 1915.

The authority to license vehicles for purposes of a wheel tax fund is not given in the Motor Vehicle Act but comes from Clause 96 of Section 1 of Article V of the Cities and Villages Act. This authority, according to the City of Lincoln decision, was taken away by the Motor Vehicle Act of 1911. The amendment of 1915, however, restores the power to impose such a tax by removing the prohibition and putting a limitation in place of same.

By the amendment of 1915 municipal corporations are prohibited from requiring a license fee or tax from an owner of a motor vehicle who does not reside in such municipality, and it limits such license fee and tax which may be imposed on an owner of an automobile who resides within such municipality according to the size of the municipality. The same provisions is carried into the Motor Vehicle Act of 1919 and appears in Section 26 to which you refer.

Pursuant to the Act of 1915 our City Council passed an amended Section 2719 fixing the tax in accordance with the new law. The same section was again amended July 21, 1919.

There has been no successful attack made on our wheel tax ordinance. The ordinance was involved in the case of *Westfalls Storage Co. v. City of Chicago*, 280 Ill. 319. The court there held that the constitutionality of a classification sanctioned by the express wording of Section 12 of the Motor Vehicle Act of 1915 was in effect sustained by the court in several cases. By this decision the validity of the Chicago ordinance in respect to the matter about which you inquire is upheld by implication. The court also passed directly on an ordinance similar to ours in the case of *Heartt v. Village of Downers Grove*, 278 Ill. 92, and held that such a tax as we impose is valid, although they held the Downers Grove ordinance invalid because they sought there to impose a tax on non-resident owners of vehicles used otherwise than for pleasure.

We therefore feel quite certain that our ordinance comes squarely within the law of 1919 and that its validity will be upheld if attacked.

Yours very truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Vouchers Drawn Against Bond Fund for Real Estate and Building Experts.

July 10, 1920.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

Your request for advice concerning the validity and effect of an ordinance passed by the City Council on June 29, 1920, which seeks to annul portions of the Appropriation Bill and to rescind an order passed on February 5, 1920, was referred to the undersigned for consideration and reply.

Your inquiry is directed particularly to the question whether you should honor certain vouchers drawn against the

street improvement bond funds for services of real estate experts which have been presented for payment.

The first section of the ordinance in question says that "the Annual Appropriation Bill for the year 1920, passed March 31, 1920, be and the same is hereby amended, by striking out," etc. The second section says that the order of February 5, 1920, "be and the same is hereby rescinded."

The portion of the Appropriation Bill which this ordinance undertakes to strike out is that authorizing the employment of real estate and building experts in accordance with the Council order of February 5, 1920, the said order being specifically referred to in the Appropriation Bill.

We understand that the ordinance has not yet been signed by the mayor. Consequently it is not at the present time in effect, and it can be entirely ignored unless the mayor approves it or fails to return it with a veto message at the next regular meeting of the City Council. If he vetoes it and it is passed over his veto it will take effect at the time of the passage over his veto and not at the time of its original passage. The law is quite clear on this point in this state.

Section 18 of Article III of the Cities and Villages Act provides as follows:

"All ordinances passed by the City Council shall, before they take effect, be deposited in the office of the city clerk; and if the mayor approves thereof, he shall sign the same, and such as he shall not approve he shall return to the Council, with his objections thereto, in writing, at the next regular meeting of the Council occurring not less than five days after the passage thereof."

The above language was construed in the case of *City of Hillsboro v. Spangler*, 146 Ill. App. 115, where an ordinance was passed on September 20, 1906, and the next regular meeting of the City Council took place on October 17, 1906. It was insisted that the ordinance was in force before the last mentioned date, publication having been made of it on September 28, 1906. The court said (p. 117):

"Appellee, in its brief, insists that the disputed ordinance became operative at the end of five days from its

passage, since the mayor did not veto the same or file any objections thereto, notwithstanding the fact that there was no regular meeting of the City Council after the passage of such ordinance and prior to the 17th day of October, 1906; the claim being that if the mayor retain an ordinance more than five days after the same is presented for his approval, by reason of that fact alone, it becomes valid, the same as though approved and signed by him.

This is a misconception of the meaning and force of such section. The mayor has, in any event, at least five days in which to determine whether he will approve or veto an ordinance. *King v. City of Chicago*, 111 Ill. 63. And he is not required to exercise his prerogative until the first regular meeting of such City Council after the expiration of the five days. *City of Chicago v. Stratton*, 162 Ill. 494.

This seems to be the only reasonable construction to be given to the statute involved, as in such view the mayor is not obliged to act hastily or ill-advisedly, but has at least five days in which to determine whether he will approve or veto an ordinance after it is deposited with the city clerk. In the case at bar the mayor did not have to act upon the ordinance in question until October 17, 1906, and as he did not approve the ordinance, its publication on the 28th day of September was of no force."

There are other authorities in this state which in effect hold the same way, but the language of the court in the above case is so squarely in point that we do not regard it as necessary to pursue this subject further.

While a discussion of the effect of the ordinance may be regarded as premature on account of its not being in force, we will point out wherein it would be invalid even if signed by the mayor.

In so far as the ordinance provides for the amendment of the Annual Appropriation Bill, it contravenes the statute, which was expressly framed with the view of preventing amendment of such Appropriation Bill after the next regular meeting held not less than five days after its passage. The words of the statute are as follows (Art. VII, Sec. 2):

"Such ordinance in cities and villages having a population of one hundred thousand or more, may be

amended at the next regular meeting of the City Council or Board of Trustees, as the case may be, occurring not less than five days after the passage thereof in like manner as other ordinances.''

This precludes the amendment of the Annual Appropriation Bill at any time thereafter. There can be additional and supplemental appropriations for three months after the passage of the Annual Appropriation Bill, even when passed on the last day of the first quarter of the fiscal year, but there can be no amendment of the original bill except at the meeting specifically mentioned.

Hence, the attempt to strike out the appropriations for real estate and building experts is abortive and can have no legal effect.

So far as the order of February 5, 1920, is concerned, if that order were still in force in its original form it could be wiped out by such an ordinance as is before us. But we are of the opinion that this order was merely temporary authority to do what the Annual Appropriation Bill afterwards fully provided for, and in any event such parts of same as were expressly ratified by the Appropriation Bill cannot now be repealed.

The City Council has the right in the first quarter of the fiscal year before the passage of the Annual Appropriation Bill, to make temporary provision for the needs of the city, the expense of which is afterwards to be included in the Annual Appropriation Bill. (*City of Danville v. Danville Water Company*, 180 Ill. 235.) This is what the City Council did by the order of February 5, 1920, and that is the only effect of that order. It became merged in the Annual Appropriation Bill when every activity or employment provided for in the order was appropriated for in the later enactment.

It is true that in the order of February 5, 1920, there were certain individuals expressly approved for the positions named, but even these were ratified in the Appropriation Bill by express reference to the order. If there had been no such express reference the only change thereby brought about would have been that the head of the department would have had the right to substitute others in place of those named,

subject to the conditions imposed by the Annual Appropriation Bill.

From the above, it will be seen that the pending ordinance could have no legal effect whatever even if signed by the mayor; and therefore we are constrained to advise you, in answer to your question, that vouchers drawn in due form for services rendered in accordance with the appropriations in question should be honored.

We return the said vouchers herewith.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Sale of Revolvers.

July 10, 1920.

HON. JOHN J. GARRITY, General Superintendent of Police.

Dear Sir:

We are in receipt of your communication of recent date forwarding to us a communication received by you from Hibbard, Spencer, Bartlett & Company in which they state that they have a customer in Chicago who deals in miscellaneous merchandise and who desires to purchase from them revolvers for the purpose of re-selling the same to persons outside of Chicago. They also state in their communication that the customer they refer to is not licensed to deal in the purchase and sale of deadly weapons.

In reply, we beg leave to advise you that Section 1 of an ordinance passed May 11, 1914, regulating the sale of firearms and other deadly weapons, provides as follows:

“SECTION 1. It shall be unlawful for any person, firm or corporation to engage in the business of selling, or to sell or give away to any person, within the city, any pistol, revolver, derringer, bowie knife, dirk or other weapon of like character, which can be concealed on the person, without securing a license so to do as

hereinafter provided, and no person, firm or corporation having secured such a license, shall sell or give away any such weapon to any person within this city who has not secured a permit from the general superintendent of police to purchase such weapon in the manner hereinafter provided."

This ordinance was amended on May 25, 1914, by adding a section known as Section 4a and reading as follows:

"SECTION 4a. It shall be unlawful for any person, firm or corporation to sell, barter or give away to any person within the City of Chicago, any pistol, revolver, derringer, bowie knife, dirk or other weapon of like character which can be concealed on the person, except to licensed dealers and to persons who have secured a permit for the purchase of such articles from the general superintendent of police as hereinafter required; provided, this section shall not apply to sales made of such articles which are to be delivered or furnished outside the City of Chicago."

Under the provisions of this ordinance it is unlawful for Hibbard, Spencer, Bartlett & Company to sell and deliver revolvers to any person within the City of Chicago except licensed dealers and persons who have secured a permit for the purchase of deadly weapons from the general superintendent of police. We must hold, as a matter of law, that the customer referred to in their letter to you comes within the provisions of the ordinance regulating the sale of firearms and other dangerous weapons.

It is our opinion, after carefully considering the ordinance licensing and regulating the sale of deadly weapons, that before Hibbard, Spencer, Bartlett & Company could lawfully make a sale of revolvers to the customer referred to in their communication to you it would be necessary for such customer to secure a license authorizing him to deal in the purchase and sale of revolvers and other deadly weapons.

In regard to their inquiry as to whether or not they could make the sale to the customer if he presented to them a permit issued by your office, it is our opinion that that provision of the ordinance must be construed as being limited to persons who desire to purchase revolvers or other deadly weapons for their personal use and cannot be extended so as to include

dealers who desire to purchase revolvers or other deadly weapons in quantities for the purpose of resale.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Pension Rights of Insane Policeman.

July 12, 1920.

THE BOARD OF TRUSTEES OF THE POLICE PENSION FUND OF
THE CITY OF CHICAGO.

Gentlemen:

In regard to the application of Margaret Griffin, conservator of Jeremiah P. Griffin, I beg leave to report that I have examined the application and all the papers submitted by the conservator, and from such examination it appears that Griffin joined the Police Department on December 14, 1896, and was connected with the department until after his application was filed on August 29, 1919, when his name was ordered stricken from the roll on account of an order of the County Court of Cook County adjudging him insane.

Letters of conservatorship were issued to his mother, the applicant herein, on December 4, 1914.

Griffin is now confined in the Elgin State Hospital, and the application for a pension is made under the provision of Section 3 of the Police Pension Fund Act. Numerous affidavits have been filed tending to prove that Griffin's insanity is due to injuries received by him while in, and in consequence of, the performance of police duty. From such affidavits and the records of the Police Department it appears that on August 9, 1911, one Nute Sears, 38 years old, 3711 Armour avenue, was shot and fatally wounded in the saloon of David Frank at 3858 South Dearborn street by Charles Young, 33 years old, residing at 3625 Armour avenue. Sears was wounded in the right groin and died the following Sunday morning at 5 o'clock at the Provident Hospital.

From the affidavits and statements of numerous witnesses it appears that Officer Jeremiah Griffin appeared upon the scene immediately after the shooting and placed the murderer under arrest. The murder caused great excitement and a large crowd surrounded Officer Griffin and attempted to lynch his prisoner. All of the witnesses to the affair agree that it became necessary for Officer Griffin to put up a desperate battle in order to save the life of the prisoner, and in doing so he sustained serious injuries about the head. It also appears from the affidavit filed with me that Officer Griffin met with another serious accident in connection with this case by falling down the steps of a building at 3642 Dearborn street while serving a subpoena on one of the witnesses to appear at the trial of Sears in the Criminal Court of Cook County.

From a careful consideration of all the facts submitted with the application of the conservator for a pension, it is my opinion that your board is justified under the law in deciding that Officer Jeremiah Griffin became insane as the result of injuries sustained by him while in, and in consequence of, the performance of police duty, and I recommend that a pension be granted him in accordance with law.

Yours very truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Certificate of Comptroller Concerning Voucher.

July 14, 1920.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

You have presented for our consideration draft of a proposed certificate which you contemplate issuing to creditors of the city who cannot at present be paid. You ask us to pass on the legality and sufficiency of the form and the authority of the comptroller to issue the same.

The certificate states in substance that a voucher has been deposited with the comptroller which is due and payable out of the fund for current general corporate purposes, that such voucher will be paid at such time as there is sufficient money on hand and that it is anticipated that such time will be not later than April 1, 1921. On the back of same is to be printed a form of power of attorney which will enable the holder to transfer his right of collection if he sees fit.

We see nothing in the certificate which is contrary to law. It creates no debt and does not bind the city to payment until the money is on hand, at which time in the regular course of business the voucher will be paid.

We understand that the certificates will be issued for the convenience of creditors of the city who desire to have something which will definitely show that they have the credit which the voucher gives them. It was the practice formerly to let the creditor have the voucher when the city was unable to pay and to take it back when payment was made. This practice has been discontinued because it interfered with the keeping of proper records and accounts, and it is now proposed to substitute the certificate in place of the voucher.

While the comptroller has no power to issue any certificate of indebtedness which will increase the debt of the city without express authority from the City Council, he has the right to issue a certificate which recites that a debt actually exists and that the same is a lawful claim against the city that has been sanctioned and duly appropriated for by the City Council. That is all the certificate in question amounts to, and its proposed form is free from legal objection.

We return your draft of same herewith.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Status of Certificates of Indebtedness Issued in 1920.

Chicago, July 19, 1920.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

You turned over to us a copy of a letter from the American Development Company asking for an opinion as to the legality of certain certificates issued to them.

The certificates state in substance that vouchers for the amounts represented by them have been deposited with the comptroller for payment, that such vouchers are due and payable out of the fund for general corporate purposes, that the same will be paid at such time as there is sufficient money on hand in that fund for the purpose, and that it is anticipated that there will be enough money in the general corporate fund to pay them not later than April 1, 1921.

On the backs of the certificates are forms of powers of attorney which will enable the corporation entitled to the money to transfer the right to collect same if it sees fit.

There is no legal objection to the issuance of these certificates. They do not increase the debt of the city, but recite that a debt actually exists which was incurred after it had been authorized by a lawful appropriation. The vouchers presented to you show that the debt was thus incurred and constitute your authority to pay out the money when you are able to draw on the fund to the extent that is necessary. It will therefore be lawful to turn over the certificates to the corporation to which the voucher is made payable.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANK S. RIGHEIMER,
Acting Corporation Counsel.

Street Railway Funds.

August 6, 1920.

HON. BION J. ARNOLD, Chairman, Board of Supervising Engineers, 105 S. LaSalle Street, Chicago, Illinois.

Dear Sir:

I have just received your letter of August 5, 1920, with which is enclosed a copy of your letter of August 5, 1920, to Henry A. Blair, president Chicago Surface Lines.

Such letters relate to the supplemental order entered by the Public Utilities Commission of Illinois on July 31, 1920, authorizing and requiring the Chicago Railways Company, Chicago City Railway Company, Calumet and South Chicago Railway Company and the Southern Street Railway Company, operating under the designation of the Chicago Surface Lines, to deposit in certain special accounts the 8% of the gross receipts of the respective companies which are required by the ordinances of the City of Chicago relating thereto, to be deposited in the renewal and depreciation funds provided for by said ordinances, and further authorizing and requiring the expenditure of the moneys so deposited in part for the purchase of additional equipment.

I note that the position taken by you is as follows:

“The provisions of this supplemental order are in direct conflict with the express provisions of the ordinances of the City of Chicago relating to said companies respectively, and without in any way discussing the economic soundness of the principles embodied in said supplemental order, I regard it as my duty as chairman of the Board of Supervising Engineers, created by said ordinances, to insist that the said companies and each of them shall comply with the terms of said ordinances until they are changed by appropriate action of the City of Chicago, or until the power of the Public Utilities Commission of the State of Illinois to modify the terms of said ordinances has been judicially established, and I do hereby so insist.”

As one of the counsel for the City of Chicago in the matter of the application of the Chicago Surface Lines pending

before the Public Utilities Commission, I beg to advise you, that in my opinion your position as above quoted is sound, with this modification:

If the power of the Public Utilities Commission of Illinois to modify the terms of the ordinances referred to should be finally judicially established, even then I think the Board of Supervising Engineers should take no action whatever pursuant to or in aid of any action of the Public Utilities Commission contrary to the terms of the ordinances. In other words, I think that the position of the Board of Supervising Engineers, not alone in the matter referred to in your letters, but in all other matters, should be that the companies should comply in all respects with the terms of said ordinances; but that if the companies are allowed in any way to repudiate or depart from any of the terms of the ordinances, then the contracts as represented by the ordinances should be treated as abrogated in their entirety and that in such case the Board of Supervising Engineers is without power or jurisdiction to act; that is to say, the Board of Supervising Engineers, if it acts at all, must act under the ordinances, and the companies have no right to call upon the Board of Supervising Engineers for any action so long as they are in a position where they are acting contrary to the terms of the ordinances, either with or without the approval of the Public Utilities Commission of Illinois.

Yours very truly,
CHESTER E. CLEVELAND,
Special Assistant Corporation Counsel.

August 18, 1920.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

Your letter of recent date concerning the payment of interest on special assessment bonds due in 1918 and 1919 was referred to the undersigned for consideration and reply.

It appears that the paper you inquire about was due in 1918 and 1919 and that default was made thereon because the

money had not been collected from the property owners from whom it was due. It is now proposed to pay some of this paper out of money derived from other sources, that is to say, it will be paid out of the interest earnings of special assessment funds. The question arises whether the city should pay interest after maturity on this paper.

The city is not bound at the present time to pay either principal or interest on these bonds if there is no money on hand collected from the property owners with which to pay same. In contemplation of law the city is but an instrumentality selected by the law to receive payment of the assessments from the property owners and to pay the same to the holders of the bonds. (*Village of Wilmette v. People ex rel. Farm Land Mortgage Co.*, 214 Ill. 107-111.) If the money is paid in by the property owners before deferred installments become due the interest on the bonds ceases as soon as sufficient money to pay them is thus paid and in the hands of the treasurer. In case the money has not been collected when the bonds become due the interest continues to run until it is collected, but the city is not bound to use other moneys to pay the bonds at maturity. If it does, of course all claim for interest ceases at maturity when the bonds are paid.

In the present instance the bonds were not paid at maturity out of other funds than those collected on the particular warrant against which the bonds were issued, but the city is now ready and willing to pay them—or a part of them—out of such funds. In view of these facts the city is in a position to let the bond holders choose between accepting the amount due at maturity without additional interest or waiting until such time as the money comes in from the property owners. If they choose to accept payment from the city, it is obvious that the city is entitled to the interest that accrues by reason of the delay in payment in order that the fund drawn on may be reimbursed.

It may be said that the interest which has accrued from the time of maturity up to the time of payment would thus ultimately go to the city if all the money came in, but this does not follow because there may be a deficiency of interest.

That there is frequently such deficiency of interest is well known, and the statute expressly makes provision for meeting deficiency in interest on account of this fact.

We are therefore of the opinion that where the city pays out of funds that it is not bound to draw upon and assumes the risk of further default in payment on the part of property owners and the risk of there being a deficiency of interest, it discharges the obligation when it pays the principal and the interest up to the date of maturity and such payment is accepted in lieu of the entire claim which the bond holder has against the property owners.

However, in its last analysis the question presented is one of policy rather than a legal question. The law permits the use of the funds that you are drawing on for the payment of both principal and interest. Hence, if these funds can be so handled that by paying interest and deferring the payment of the principal until the whole lot of bonds that are in default can be met and no favoritism results, the comptroller may in his discretion use the funds in that way. But we would not advise the payment of the interest after maturity unless it is perfectly clear that there will ultimately be enough money realized to take up all the bonds in default. Otherwise there will result a discrimination that will cause dissatisfaction and trouble in the future.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Circulation of Pledge Cards by Civil Service Employee.

August 24, 1920.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

Your verbal request to be advised concerning the legal right of a civil service employe to circulate pledge cards for a candidate for public office and secure the signatures thereon

of persons thus pledging their votes to such candidate, has been referred to the undersigned.

The Civil Service Law and the rules of the Civil Service Commission, now in force and effect, contain no provisions which prohibit any such political activity upon the part of a civil service employe. That a civil service employe as a citizen would have the right to secure such pledge cards is unquestioned; therefore, in the absence of any statutory provisions or rule of the Civil Service Commission prohibiting a civil service employe from doing an act which as a citizen he has the legal right to do, it resolves into a question of whether the facts and circumstances in connection with any such political activity upon the part of a civil service employe would constitute cause for his discharge from the service.

The provisions of the civil service law applicable to removal from the classified service, read in part as follows:

“Sec. 12. REMOVALS.) No officer or employe in the classified civil service of any city who shall have been appointed under said rules and after said examination, shall be removed or discharged except *for cause*, upon written charges and after an opportunity to be heard in his own defense.”

The civil service rules, now in force and effect; do not specify what shall constitute cause for removal, thus leaving the commission to be guided in such matters by the express provisions of the Civil Service Act and the construction placed thereon by the courts. The Civil Service Act enumerates certain specific acts of a political character which are prohibited, but, from a perusal thereof, it is obvious that the Legislature intended to prohibit the use of money, or the improper use of the office or position to further the candidacy of a person or persons, rather than all political activity in general, or such as a citizen is ordinarily entitled to exercise.

“Cause” for removal has been repeatedly defined by the courts, and undoubtedly must constitute legal cause for removal, with respect to which the following are cited:

In the case of *Kammann v. City of Chicago*, 222 Ill. 63, the court, on page 65, said:

“The statute is silent as to what constitutes ‘cause.’

Manifestly the rights to determine that question is left with the Civil Service Commission, and we have held that this statute does not require the commission to specify in written rules, every case which shall be deemed cause for removal. *Joyce v. City of Chicago*, 216 Ill. 466."

In *People ex rel. Munday v. Fire Commissioners*, 72 N. Y. Repts., p. 445, the court defined "cause" to be "some dereliction or general neglect of duty or incapacity to perform the duties, or some delinquency affecting his general character and his fitness for the office."

In *State ex rel. Hart et al. v. Common Council of Duluth*, 53 Minn. 238, the court, on page 244, said:

"The cause must be one which specifically relates to and affects the administration of the office and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. The cause must be one touching the qualifications of the officer or his performance of his duties, showing that he is not a fit or proper person to hold the office. * * * In the absence of any statutory specification the sufficiency of the cause should be determined with reference to the character of the office and the qualifications necessary to fill it."

In the case of *City of Rockford v. Compton*, 115 Ill. App. 406, the court, on page 415, said:

"Where the statute permits the removal of an officer only for cause, after a hearing, the proceeding must be based upon specific charges, sufficient in their nature to warrant a removal; and they must be proved, unless their truth is admitted. The statute does not mean that if any charge, however, frivolous or unimportant, is preferred and proven against an officer, he may then be removed. The charge, in order either to put the officer on trial or to justify his removal, must set forth some dereliction or neglect of duty, or an incapacity to perform the duties of his position, or some delinquency affecting his general character and his fitness for the office. The cause assigned must be personal to himself and imply an unfitness for the place. Throop on Public Officers, Sections 266, 279; Mechem on Public Officers, Sections 457, 458; *Commonwealth v. Arnold*, 3 Litt. (Ky.) 310."

In the case of *City of Chicago v. Gillen*, 124 Ill. App. 210, the court, on page 211, said:

“In the first place, the statute provides that no person in the classified service can be removed ‘except for cause on written charges.’

“A cause means some substantial shortcoming which renders continuance in his office or employment in some way detrimental to the discipline and efficiency of the service, and something which the law and a sound public opinion will recognize as a good cause for his no longer occupying the place.”

In view of the foregoing, I am of the opinion that the mere securing of such pledge cards is not legal cause for the discharge of a civil service employe, but, if it should appear from the facts adduced that such employe used his office or position to secure such pledges, or such activities occasioned some dereliction or neglect of duty, impaired his efficiency, or is detrimental to the discipline and efficiency of the service, such facts would constitute legal cause for removal and warrant such a finding and order by the commission.

Yours very truly,

H. C. FOSTER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Access to Police Records.

August 25, 1920.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

In response to your verbal inquiry concerning the rights of newspapers in the matter of the inspection of crime records of the Department of Police, we submit the following:

The publishers of newspapers as such have no greater right of access to public documents or records of public officers than the general public. They can exercise the right to inspect many of the records of municipalities that may be denied to the public in general if they claim such right as taxpayers, but there is no right lodged even in a taxpayer to obtain access to records of crime.

The City Council by an order passed October 19, 1914, (Council Journal, p. 1756) directed the general superintendent of police to make a report of complaints at each Council meeting. While there is some doubt as to the validity of such an order on the ground of public policy, nevertheless this has been observed, and we assume that your inquiry is not directed to this matter, but rather to records that are not expressly made public by ordinance.

The common law prevails in the State of Illinois with respect to matters not regulated by statute. Under the common law no general right to inspect records exists where a party is without a direct interest in the subject-matter; and the statutes of this state do not specifically give the right of access to police records of crime.

The common law rule is well stated in 34 Cyc. p. 592, as follows:

“At common law no person is entitled to inspect public records, either personally or by agent, or to make copies, abstracts, or memoranda therefrom, unless he has such an interest therein as would enable him to maintain or defend an action for which the record sought can be furnished as evidence or necessary information, and the interest of the person demanding the inspection must be direct and tangible.”

To this should be added, however, the following qualification, taken from another text-book:

“It is not essential that the interest be private, capable of sustaining a suit or defense on his own personal behalf; but it will be sufficient that he act in such suit as the representative of the common or public right.” (Am. & Eng. Enc. of Law, Vol. 20, p. 523.)

The federal statutes and the statutes of many of the states have done away with the necessity of interest, and in such states any person may examine and take memoranda from public records.

In this state there is no such general provision, but there are many statutes expressly authorizing inspection of records that are particularly named. By reason of this, records and documents which are kept by virtue of provisions of the law are usually open to the public for inspection, and the im-

pression seems to prevail quite generally that they can be examined as a matter of right; whereas, in fact, many of them are open to the general public more as a matter of favor on the part of the officer controlling them than as a matter of right. The right to inspect in any event is limited to such records and documents as the law requires the officer to keep.

In the case of public records that may be examined by a party in interest, there does not appear to be any Illinois decision which exactly defines how far a person may go who has no interest in the record further than that he wants to publish its contents as a matter of news.

There is some conflict of authority as to whether such a person has the right, in the absence of statutory provision, to inspect and take memoranda from ordinary public records for publication. But the authorities all agree that the privilege of inspecting public records may properly be denied to such a person, and even to an interested party, where the records are of such a character that the officer in charge thereof is vested with a discretion in regard to admitting persons to inspect them. (34 Cyc. 595.)

Records of crime in the police department are preeminently of the class last mentioned. It is clearly within the discretion of the head of that department, who is charged with the responsibility of suppressing crime and discovering offenders, to say what is proper to be given to the public and what is not, so far as the records of crime in the department are concerned. When a prisoner is booked, that record becomes one that is open to the public, but any other information in the hands of the police may be suppressed except in so far as the ordinances of the city require that reports be made to the City Council.

To show that, in the absence of a statute governing the matter, a wide discretion is lodged in the officer, we quote from a case in Rhode Island where the clerk of a court refused a newspaper a copy of the proceedings in a divorce case. Since court records and court documents and proceedings are generally looked upon as public matters open to inspection, the case is peculiarly in point. After quoting the com-

mon law rule, and stating that it had been done away with by statute in many states, the court said:

“As there is no statute in this state, however, regulating this matter, the common law rule above stated, in so far as it is applicable here, is doubtless in force. Whether or not we should be willing to go to the full extent thereof, we are not now called upon to decide. But it is clearly within the rule to hold that no one has a right to examine or obtain copies of public records from mere curiosity, or for the purpose of creating public scandal. To publish broadcast the painful, and sometimes disgusting, details of a divorce case, not only fails to serve any useful purpose in the community, but, on the other hand, directly tends to demoralization and corruption thereof, by catering to a morbid craving for that which is sensational and impure. The judicial records of the state should always be accessible to the people for all proper purposes, under reasonable restrictions as to the time and mode of examining the same; but they should not be used to gratify private spite or promote public scandal.”

In re: Caswell, 18 R. I. 835.

The rule stated above is a safe one to follow in this State. In the case of the records of crime in the Department of Police the discretion of the head of the department can be exercised to the extent that public policy may require. It is certainly clear that he may refuse to give out for publication any records that will tend to lower public morals or that will tend to obstruct or embarrass the efforts of the department in ferreting out crime.

We, therefore, beg to advise you that outside of the report required to be published for each council meeting and the record of booking of criminals when arrested, the general superintendent of police is not compelled by law to divulge records of crime to the newspapers.

Yours, respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Purchase of Bonds of Chicago Real Estate Improvement Corporation.

Chicago, Aug. 26, 1920.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

Your request for an opinion on the legality of a plan for the purchase, by the city, of bonds issued by the Chicago Real Estate Improvement Corporation, was referred to the writer for consideration and reply.

From the information at hand it appears that the corporation above mentioned controls the Chicago Housing Association, which is comprised of public spirited citizens who have subscribed a large sum of money with which to erect homes to be sold to wage earners of small means at cost. It is proposed to request the City Council to co-operate with the association by making provision for the purchase of \$50,000 of the bonds issued by the corporation.

With respect to the funds of the city that are not in the nature of trust funds, this department has consistently held that the law does not permit their investment in securities of this kind. The law specifically provides that such money may be deposited at interest in depositories selected in a certain way, that it may be used for the purchase of tax anticipation warrants and bonds issued by the city and that certain money in sinking funds for bonds may be used to purchase bonds of the particular issue that have not yet matured. Outside of these uses the law requires that the money of the city should be expended for the purposes for which it was collected.

The enumeration of these uses to which the money of the city may be put implies the exclusion of any other uses not specially named.

There is, however, one exception to the general rule stated above. That is where the city holds money as a trust fund for a particular purpose which is not mentioned in the statutes and the same is not immediately required therefor. The traction fund is an example of such a fund. This fund was created by ordinance and there is nothing in the statutes governing the action of the city in relation thereto. As to such a

fund the city is not bound to let it lie idle, and there is even authority to the effect that as a trustee the city is bound to handle the fund so as to make it productive.

McQuillin on Municipal Corporations, Section 2163, sets forth the following rule:

“Seldom have municipal corporations surplus moneys for loan and investment. But where such a condition of affairs presents itself, the municipality has power to loan or invest in proper securities, unless it should be forbidden by statute.”

As above stated, there is no statutory inhibition against the use of such a fund as the traction fund, or any other fund which the city holds as trustee, for purposes of investment in safe securities. In conformity with that view we have held in the past that it was lawful to invest such funds in Liberty Bonds. Whether or not it should be used for investment in any other class of securities than federal, state or municipal bonds is a question of policy which must be determined by the City Council. A trustee is liable for the careless or reckless investment of trust funds whereby they are lost. Just how far that rule prevails in the case of a municipality acting as trustee we are not called upon to say, but that some liability attaches is certain.

We are therefore of the opinion that special trust funds may be used for the purchase of bonds if the City Council finds it expedient and proper to invest same while the money is not being used.

Yours truly,

LEON HORNSTEIN,

Approved: *Assistant Corporation Counsel.*

SAMUEL A. ETTELSON,
Corporation Counsel.

Revocation of Factory License.

August 27, 1920.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

We beg leave to acknowledge receipt from you of the petition which was presented to you by the property owners,

tenants, citizens and householders living in the vicinity of Woodlawn and Lake Park avenues and East 46th street, in which they ask that the license heretofore issued to the Stafford Spring Guard Company to operate a factory at 1224 to 1244 East 46th street, be revoked, together with your request for us to investigate the said complaint and to make such recommendations as we may determine under the law from the facts disclosed in said investigation.

In reply, we beg leave to advise you that the ordinances of the city provide that, before a license shall issue to construct or maintain a factory, such as is maintained by the Stafford Spring Guard Company, in any block within the city where two-thirds of the buildings fronting on both sides of the streets or alleys in the block are used exclusively for residence purposes, the consent of a majority of the *bona fide* property owners must first be obtained.

The Stafford Spring Guard factory is located in a district which is exclusive residence territory, and, under the ordinances, the consent of a majority of the *bona fide* owners of the frontage on both sides of the public highways in the block in which the said factory is located must be secured.

The Map Department has computed that the entire property frontage surrounding this factory within the limits described by the ordinance is 1,198.60 feet, and that 599.31 feet is necessary in order to have a majority of the said frontage. The report of the Map Department discloses that the Stafford Spring Guard Company presented a petition containing the signatures of the *bona fide* owners of 818.21 feet, giving them a surplus of 218.89 feet. There has been presented to us an affidavit signed by Emma F. Wallace who owns 20 feet of frontage, and also an affidavit signed by Harry Weinstein who owns 254 feet of frontage, in which they revoke and withdraw their signatures from the petition containing the names of the frontage owners presented to the Map Department. They both appeared at a hearing in this office yesterday, August 26, 1920, at 2 P. M., and stated that their signatures were secured by false representation and misstatements as to the character of the business to be conducted by the Stafford Spring Guard Company. They also

presented a communication signed by L. F. Stafford, under date of April 22, 1920, in which he stated that he desired to use the building only for the purpose of assembling and enameling auto accessories.

We heard the statements of a large number of witnesses, all of whom say that the business conducted there is not the character of business represented by the Stafford people when they secured the signatures of the property owners, and from the statements of the people in the vicinity, which are not contradicted by any one, but, on the contrary, admitted, this building is not a place where only assembling and enameling of auto accessories is carried on, but, on the contrary, the Stafford Spring Guard Company is engaged in the business of manufacturing automobile bumpers, and these premises are now being used as a manufacturing establishment.

I am of the opinion that the fact that they were to manufacture automobile bumpers was concealed from the residents in the vicinity of this factory, and I believe that the signatures of Emma F. Wallace, representing 20 feet of frontage, and the signature of Harry Weinstein, representing 254 feet of frontage, was procured by false representation, and, under the practice prevailing in cases of this kind, as well as the law, they are entitled to withdraw their consent.

Deducting these 274 feet from the total number of feet of frontage contained in the petition presented to the Map Department, the Stafford Spring Guard Company is 55.80 feet short of having a majority of the frontage which the ordinances of the city require them to have before the granting of a license.

I, therefore, recommend that the license heretofore issued to the Stafford Spring Guard Company to maintain a factory at 1224 to 1244 East 46th street be revoked.

Yours very truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Compensation From Traction Companies.

August 27, 1920.

HON. MACLAY HOYNE, State's Attorney, Criminal Court
Building, Chicago, Ill.

Dear Sir:

Replying to your inquiry as to the refusal to accept certain moneys recently tendered to the City of Chicago by the Chicago Surface Lines, and the Chicago Telephone Company, respectively, we beg to say:

We take the position that these companies should be compelled to live up to their contracts in their entirety; but, if they are relieved from doing so, that they should be compelled to give them up in their entirety; that they cannot, in law or equity, keep the parts of the contract which are advantageous to themselves and, at the same time, give up the parts of the contracts which are advantageous to the city and the people.

Acting by authority of the Public Utilities Commission, these companies have refused to keep and live up to those parts of their contracts with the city prescribing the rates they will charge and the service they will render to the people. At the same time they are trying to hold the city and the people to other provisions of their contracts. As illustrative, take the contracts between the city and the Chicago Surface Lines, with which you are familiar. The companies have repudiated their agreement, made not only with the city but also, on referendum, directly with the people themselves, to furnish to the people first class service for five cent fares, during the entire term of such contracts; and are now charging the people eight cent fares, which increases the toll they are taking from the people over the contract rate more than \$60,000 a day or more than \$21,000,000 a year. At the same time they are doing their utmost to hold the city and the people to those parts of the contracts which are very advantageous to the company but disadvantageous to the city and the people; among such provisions being those relating to the capital account or purchase price.

As you know, when one party to a contract repudiates it in essential particulars, the other party cannot continue to accept benefits under it and then deny that the contract remains in force for the benefit of such repudiating party.

Therefore, we have concluded that, if the city should continue to accept the moneys tendered to it by these companies under their contracts with the city, the result would be, or at any rate there is very grave danger that the result would be, that it would be held that thereby the city, for practical purposes, had acquiesced in the repudiation by the companies of those parts of the contracts pertaining to rates and service. And, for this reason, we have deemed it to be our duty to advise the city not to accept such moneys.

We have herein gone into this matter only briefly and generally, because we have assumed that you are quite familiar with the situation. If, however, you desire any further information from us we will be glad to furnish it upon request, to the best of our ability.

Yours very truly,
CHESTER E. CLEVELAND,
Special Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Transfer of Money From Bridge Bond Fund to Twelfth
Street Viaduct Bond Fund.**

September 2, 1920.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

You forwarded to us a letter from the commissioner of public works to the Finance Committee and a letter from the chairman of that committee to you concerning the proposed transfer of \$300,000 from Account 491-X-6, Roosevelt Road (formerly Twelfth street) Bridge appropriation to Account 491-X-100, Twelfth street viaduct appropriation.

It is stated in the city engineer's letter that it is neces-

sary to make this transfer in order that work may be continued, that the sum of \$791,350 will ultimately be collected from the railroad companies as their share of the cost of constructing the viaduct, and that the money thus collected can be used to reimburse the Bridge Bond Fund from which the \$300,000 is to be transferred. You state, in your letter transmitting these papers, that a large part of the money to be paid by the railroads is now due, that warrants for collection are being prepared, and that if this money could be obtained the work could proceed until the first of the year.

The transfer requested involves a temporary transfer from one bond fund to another bond fund, a procedure which would be contrary to law. The Bridge Bond Fund was authorized for the purpose of constructing bridges. It cannot be assumed that it was intended that any portion of it was to be used for the construction of viaducts. This is emphasized by the fact that a separate bond issue for the 12th street viaduct was authorized by ordinance and approved by the voters.

Such being the case, the proposed transfer cannot be lawfully made even though the prospect of early reimbursement is good. If this could be legally done in this instance it could be done in every case where a fund runs short, and the safeguards raised about such a fund by statute would be rendered nugatory.

We recommend as an alternative to the proposed plan what you yourself suggest in your letter, namely, that immediate steps be taken to collect the money due from the railroad companies.

We return papers referred to herewith.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Vacation of Alleys at Oakley Ave., 62nd and 63rd Streets.

Chicago, Sept. 10, 1920.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

In response to your request for advice as to the rights of the parties seeking to vacate the alleys in the block bounded by South Oakley avenue, West 62nd street, West 63rd street and the C. St. L. & P. R. R. right of way, we submit the following:

An effort was made on behalf of the Chicago Title and Trust Co. to secure an ordinance vacating the alleys in question, and such ordinance was prepared and submitted to the Committee on Local Industries. This committee fixed the compensation to be paid at \$4,252.51 (See Pamphlet No. 1100), and reported the ordinance out with a recommendation for passage. (Council Journal, June 29, 1920, p. 620.)

The parties who are seeking the vacation now come to you and declare that the compensation fixed in the tentative ordinance is out of all reason, and they insist that they have the right, under the statute, to vacate the alleys without any action on the part of the city authorities beyond the approval of the written instrument and plat showing the vacation; also that they have the right to compel such approval by mandamus. The offer is made, however, to pay some nominal compensation, so that the vacation ordinance may be passed as originally proposed, but with a small amount in lieu of the sum fixed.

It appears from an abstract submitted to us that the block here involved is part of a subdivision for which the plat was recorded in due form on Sept. 7, 1892, in Book 57 of Plats, at page 16. All formalities seem to have been complied with, and the dedication of the alleys shown thereon must be regarded as a statutory (as distinguished from a common law) dedication.

The right of the owner to vacate the whole or a part of the plat so recorded under the statute is governed by the provisions of Sections 6 and 7 of the act in relation to plats. (Hurd's Rev. St., 1917, pp. 2226-7.)

By these sections the owner may at any time before the sale of any lot therein vacate the whole plat by a written instrument, to which a copy of the plat must be attached, declaring the same is to be vacated. This instrument must be approved by the City Council or by an officer designated by it. The same may be rejected if it abridges or destroys any public rights in streets or alleys. If approved and recorded, the instrument destroys the force and effect of the plat first recorded. In case lots have been sold all the owners must join in executing the instrument of vacation. A portion of the plat first recorded may be vacated in like manner, and subject to the same conditions as in the case of a vacation of the whole, with the added provisions that such vacation of a part shall not abridge or destroy any of the rights or privileges of other proprietors in such plat, and that the right to vacate such part of a plat shall not authorize the closing or obstructing of any public highway laid out according to law.

The provisos above mentioned have been the subject of many judicial interpretations which we will not discuss at length, but which, for the purposes of this opinion we may summarize as holding that the right of the City Council (or the officer designated by it) to approve or reject is not an arbitrary one, but one which must be exercised without discrimination (See *People v. Massieon*, 279 Ill. 312), and holding that the rights of parties owning property in a block not included in the vacation are not violated where the vacation does not close or obstruct a highway or interfere with access to or the free use of their property. (See *Sheldon v. Rockford & Interurban Ry. Co.*, 288 Ill. 576.)

Gauged by the rules thus laid down, it would seem as though the owners of the property in question have the right to vacate the alleys in this block. They are the sole owners of all the property in the block, the vacation will apparently not interfere with the rights of owners in the other blocks, and the alleys are not in use as public highways, so that no public rights will be abridged or destroyed. It is quite possible that, under the authority of the first case cited, a writ of mandamus to compel the city authorities to approve

the vacating instrument may be secured, although we do not want to be understood as conceding this.

The ordinance that is pending was prepared under the provisions of the statute relating to vacation of streets and alleys. (Hurd, Rev. St., 1917, p. 2953.) It is possible under this act to provide for vacation where there is a common law (as distinguished from a statutory) dedication, where there is more than one ownership, and in other cases where an obstacle to a statutory right to vacation presents itself. In the present instance it may be of some benefit to the parties interested, although it would seem to us from the facts before us that such benefits are remote.

In view of the foregoing, we are of the opinion that, if the fixing of the compensation at some amount that the parties are willing to pay will not establish a bad precedent, it would be proper to come to some agreement with them, so that litigation may be avoided.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Payment of Claim of Strauss Bascule Bridge Co.

September 23, 1920.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

We are in receipt of your letter of recent date containing the inquiry of the city engineer concerning the payment of the claim of the Strauss Bascule Bridge Company.

You state therein that there has been an award of \$348,000 made to this company, and that this constitutes a claim mutually agreed upon and legally approved. You further state that this amount represents an additional cost, over and above previous estimates, on the trunnion bascule bridges already built or being built in the city.

It also appears from your letter that about \$450,000 in salvage from various bridge bond issues is now available, aside from the \$1,200,000 realized and on hand from the separate issue for the Roosevelt Road bridge.

To your question as to whether any portion of the above amounts could be used to pay the claim of the Strauss Bascule Bridge Company, we reply that, if the claim can be apportioned among the various bridges, each fund from which the bridge was built or is to be built can be drawn on to the extent that the extra cost may be chargeable thereto.

There are several ways in which this can be effected, and we are of the opinion that it would be lawful to adopt any one or more of them for the purpose of meeting the legitimate charge caused by this extra expense. We suggest the following:

In any case where an appropriation has been made for the construction of a particular bridge, involving an infringement of the Strauss patents, a proportionate part of the approved claim may be treated as a part of the cost of this particular bridge. In all such cases the sum or sums so apportioned may be paid out of existing appropriations for such bridges. It would not be necessary for the purpose of making such payment to have further action of the City Council.

It will also be legal to make a transfer of funds for the purpose from salvage of bridge bond funds, which we understand to mean the balance of moneys remaining from bridge bond issues where the object for which the issue was made has been carried out and the entire cost of the work defrayed.

In addition to the above, it will be lawful to transfer sums already appropriated to the bridge division for other specific purposes. In such case the transfer must be made by the City Council by a two-thirds vote of all the members. (See Section 2a of Article VII of the Cities and Villages Act.)

Finally, we incline to the opinion that a new appropriation may be made at the present time to pay all or a part of this claim out of the proceeds of the general bridge bond issues, because, in our judgment, an appropriation out of the

proceeds of bond issues may be made after the first half of the fiscal year, such use of the money having been previously expressly authorized by vote of the people. However, since the validity of the latter method of making appropriations from bond funds has never been passed on by our Supreme Court, we think it would be preferable to exhaust the preceding methods of securing the money before resorting to it.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Ordinance Requiring Heat in Buildings.

Chicago, October 7, 1920.

HON. WM. R. FETZER, Chairman, Committee on Public Health.

Dear Sir:

Pursuant to the instructions of the corporation counsel, the writer has examined the proposed ordinance requiring persons who own or control buildings and have contracted to furnish heat in same to maintain a temperature of 70 deg. Fahrenheit therein, and submits the following:

After a very careful and exhaustive examination of the authorities that are accessible it is safe to say that no such ordinance as is before the Committee on Health has been passed on by the reviewing courts. Any opinion as to its validity or as to the right of the municipality to pass any ordinance of that character must therefore be based on a consideration of the extent of the police power of the state.

So far as the delegation of power to the city is concerned, it does not seem necessary to go into that question. It may be assumed that, under the broad general power granted to do all acts and make all regulations necessary or expedient for the promotion of health and the suppression of disease, the city has the right to pass any ordinance which reasonably tends to promote the health of the public that is not in con-

flict with any statute on the subject and is not open to objection as discriminatory, arbitrary, oppressive, confiscatory, or in violation of contractual rights.

The courts have gone very far in upholding safety and health regulations. The right to specify with great particularity the manner in which buildings shall be constructed and maintained is no longer an open question. Subject to the limitations just mentioned, the city has the power to prescribe all regulations that may be necessary or expedient to promote health and safety therein.

Among the subjects that have been legislated upon and favorably viewed by the courts are the following: the proportion of the lot to be covered by buildings; light and air shafts as a means of ventilation; water supply, plumbing and privy arrangements; keeping animals out of living rooms; forbidding cellars for use of living rooms; materials in walls and ceilings of living rooms; requiring minimum of air space to each occupant of tenement; size of windows in living rooms; forbidding use of tenements for unwholesome occupation; forbidding manufacture of clothing in living rooms.

It seems but a step from any of these to a regulation of the amount of heat that may be required where the heating apparatus is beyond the control of the tenant. Whether this can be said where the heating apparatus is within the control of the tenant as in the case of stores, on the other hand, is doubtful.

The regulation of the class of buildings known as tenements (which includes all apartment buildings) especially is well within the police powers of the state. This is on the theory that these buildings are occupied at all hours of the day and night, in time of sickness or health by persons of both sexes of all ages and conditions, many of whom are helpless and ignorant and unable to assert themselves if their natural or contractual rights are interfered with. The physical condition of women and children is now regarded as a matter to be guarded by regulations under the police power. Hence, a reasonable regulation in regard to heat in tenement buildings where the owner agrees to furnish heat, would, in our opinion be sustained by the courts.

In support of this view we point to the case of *Health Dept. of N. Y. v. Trinity Church*, 145 N. Y. 32, which was decided as early as 1895, and which has been followed by a long line of decisions all over the country. The court there held that an act requiring tenement houses to have a supply of water on each floor occupied, or intended to be occupied, by one or more families, when so directed by the Board of Health, and prescribing a penalty for failure to do so, is a valid exercise of the police power. Since then the U. S. Supreme Court has passed on and upheld the right of the New York authorities to compel the substitution of a different system of sewerage in place of the school sinks formerly in vogue in such buildings.

(*Moeschen v. Ten. House Dept. of City of N. Y.*,
203 U. S. 583.)

From the above and other authorities we reach the conclusion that an ordinance requiring the owners of tenement buildings to submit plans for the heating plants to the city authorities, specifying the minimum requirements thereof, and providing that the owners shall maintain same in such a way that a certain temperature can be secured by the tenants in each room under reasonable sanitary conditions, would be upheld as valid. This falls short of the positive and drastic provisions incorporated in the tentative ordinance submitted to us, but in our opinion it is as far as it is safe to go.

With respect to office buildings or stores, we doubt very much whether the police power extends beyond the proper construction and installation of a heating plant. That is to say, we believe it would be proper to require the submission of plans as in the case of tenement houses, but the reason for extending the strong arm of the law is not so great owing to the character of the occupancy and the limited time that the persons who occupy it remain there.

It is quite probable that an ordinance requiring a certain degree of heat in factories and workshops would be held to be a valid exercise of the police power. No doubt exists as to the right to prescribe regulations generally concerning

light and sanitary conditions in such places, and it is but reasonable to assume that a requirement as to temperature will be regarded as on the same plane and footing as any other sanitary regulation designed to promote the health of the persons working in such places.

In the case of *City of Chicago v. Chicago City Ry. Co.*, 222 Ill. 560, the Supreme Court upheld the so-called public comfort ordinance of the city relating to street cars, in which the temperature was required to be maintained at not less than 50 deg. Fahrenheit; but since then the U. S. Supreme Court, in the case of *South Covington Ry. Co. v. Covington*, 235 U. S. 537, held a similar provision unreasonable on the ground that it was impossible to maintain such a temperature in a car where the doors were frequently opened. We do not regard the reason given in the latter case for holding the ordinance unreasonable as applicable in case the minimum temperature of a workshop or factory was prescribed by ordinance, because the same conditions do not prevail; and having in mind the decision of the Illinois Supreme Court just mentioned, we are inclined to the opinion that such a provision in regard to workshops and factories would be upheld.

While we are unable, therefore, to say that the ordinance presented would be held valid, yet we are of the opinion that an ordinance along the same lines but modified as we indicated above, would be sustained.

In order that you may have our ideas before you embodied in concrete form so that you can act on them, we have drafted an ordinance which might be considered along with the one now before you. We submit same herewith.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Sets of Master Keys as Burglars' Tools.

Chicago, Nov. 3, 1920.

HON. JOHN J. GARRITY, Superintendent of Police.

Dear Sir:

You forwarded to us a card containing a dozen sets of five keys each which are described thereon as "Master Keys" and which, the card announces, "Open Hundreds of Different Locks and Padlocks."

Your letter says that, in your opinion, and in the opinion of several commanding officers of your department, these keys are nothing more nor less than burglars' outfits of keys, and that they will be very dangerous in the hands of criminals, while they will be of no benefit to anyone else.

You ask whether the police have the authority to stop the sale of these keys and confiscate them as burglars' tools.

There does not appear to be any law under which you would have the right to prosecute the vendor or to seize the keys as burglars' tools while in the possession of a vendor who has a good reputation. On the other hand, the possession of same by a person who has a record as a criminal or possession with slight evidence of intent to commit burglary would be sufficient to convict under Section 39 of the Criminal Code, which reads as follows:

"§39. Whoever is found having any pick-lock, crow, key, bit or other instrument or tool, with intent to break and enter any building, ship or vessel, with intent to commit the crime of murder, rape, robbery, larceny, or other felony, shall be imprisoned in the penitentiary not less than one nor more than two years."

The above is the only enactment in this state which bears directly on the subject. Under similar laws in other states it has been held that the offense is complete as soon as burglars' tools are procured with a design to use them. It is not necessary to show a specific intent to use them at a particular time, in a particular manner, nor at any particular place. Nor is it necessary to show that the implements were originally made or intended for burglarious use. (See 9

Corpus Juris, 1093; 6 Cyc. 257.) A common key has been held to be within a statute like the above. (*Reg. v. Oldham*, 5 Cox C. C. 551; *Com. v. Tivnon*, 8 Gray (Mass.) 375.) In the case of *State v. Hahn*, 11 Ohio S. & C. Pl. Dec. 311, it was held that it was not necessary to show that the accused intended to use the implements himself, but it was sufficient if it could be shown that an improper use by another was intended.

There are numerous decisions along these lines which indicate that the possession of these implements would call for very little additional proof of intent to use them for the purposes of burglary, but without some proof of intent you are powerless to act.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Itinerant Vendors.

November 4, 1920.

HON. WILLIAM H. WESBY, City Collector.

Dear Sir:

Your letter of October 6th addressed to the corporation counsel has been referred to me for reply.

I have examined the printed letter of Mr. Buxbaum and also the contract submitted with the letter. In your letter you say, "the question arises whether he or the people he purports to represent come within the ordinance licensing itinerant merchants and transient vendors of merchandise, which provides for a license fee of \$50 for each day an itinerant merchant, as defined in said ordinance, is engaged in business."

Mr. Buxbaum as a manufacturer's agent has the right to represent one or more manufacturers residing outside of the City of Chicago. In fact at the time the Manufacturer's

Agents License was passed, it was represented to the License Committee that a manufacturer's agent often represented more than one manufacturer.

The contract submitted, which provides for Mr. Buxbaum to represent outside manufacturers and to receive a commission depending upon the amount of business, which he or his salesmen bring in, is in my opinion, entirely within the law.

The letter or printed circular which solicits the appointment of Mr. Buxbaum as a manufacturer's representative and sets out the itinerant merchants license is not worded perhaps in the best language, and perhaps might convey a wrong impression to some one seeking to evade the itinerant merchants license of \$50 a day. The fact that Buxbaum & Company solicits additional business is not in my opinion a violation of the itinerant merchants ordinance, and while some outside manufacturers might be and probably will be led to appoint local agents in Chicago and the city will thereby lose the itinerant merchants license fee of \$50 a day, nevertheless, the City of Chicago and the merchants of the City of Chicago will be benefited by having a representative in the city all the time. I would suggest that E. L. Buxbaum & Company be advised to word their letter or circular, so as to prevent any wrongful interpretation of the same.

In conclusion, I am of the opinion that the manufacturers whom Buxbaum & Company represent and with whom they have a contract similar to the form submitted with your letter do not come within the ordinance licensing itinerant merchants and transient venders of merchandise.

Very truly yours,

MORTON S. CRESSY,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Settlement of Coal Bills.

Chicago, November 5, 1920.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

Your letter of recent date concerning the attitude of the Bureau of Engineering on the price to be allowed for coal diverted in transit was referred to the undersigned for consideration and reply.

The question that has arisen hinges on the interpretation to be placed on the word "shipper" as used in the executive order of the U. S. Fuel Administrator on November 12, 1919. The order is to the effect that coal diverted in transit shipped under a *bona fide* contract entered into prior to October 30, 1911, "shall be paid for by the party receiving the same at the price at which shipper would be entitled to bill the same to the original consignee thereof."

You state that the Bureau of Engineering has maintained that the "shipper" was the mine operator and producer, and that it has settled all previous bills on that basis. The bill under discussion substitutes the jobber for the producer as the "shipper." In support of their contention the parties who insist on this interpretation have secured a letter written to you from Mr. G. W. Reed, who was a member of the coal committee during the time of the strike when the coal was diverted. This letter is entitled to serious consideration because the writer says that he arrives at his conclusion "from conferences during the war with various members of the U. S. Fuel Administration and study of several orders in which that term is used."

While this letter is merely an expression of opinion and not authoritative, it serves to complicate matters because a different view from that taken by the city's engineers is stated therein.

Mr. Reed holds that the producer is the "shipper" only when the coal has been sold directly to the ultimate consignee. In cases where coal is sold to the jobber or broker and shipped to the ultimate consignee he regards the jobber or broker as the "shipper"; and where the coal has been shipped to an intermediate consignee for reconsignment to

an ultimate destination he holds that the intermediate consignee is the "shipper."

While we are disposed to give much weight to Mr. Reed's opinion and do not question the good faith of the parties, we are constrained to hold that the "shipper" in this instance must be understood to mean the producer.

The word "shipper" has a very definite meaning. It is the person who sends the coal. He may send it to the jobber, and if the jobber reconsigns it to the ultimate purchaser before it is diverted in transit the jobber becomes the shipper. But if it is diverted before it reaches the jobber nothing but the most strained construction would make a shipper out of a consignee who does not receive anything to ship. Hence, it is our opinion that in all cases of this kind where coal was diverted to the city before it was received by the jobber the diversion was from transit to the jobber and the producer must be regarded as the shipper.

We believe the same rule should be followed where the producer ships to the consumer but charges it to the jobber. Delivery in such a case is a delivery to the jobber at a point designated by him. The mere fact that this point happens to be the plants of the ultimate consumer does not change the status of either seller or purchaser, and the producer still remains the shipper.

In other words, the status of the shipper is fixed at the point of diversion. If the coal has reached one destination and is re-consigned to another, the first consignee becomes the shipper, but until it has reached its first destination the producer is the shipper. It would seem to us that any other rule would open wide the door to fraud and profiteering. As stated above, we do not intimate that the parties in this case have injected the jobber in order to secure an extra profit—in fact we do not know who the parties are—but there would be a tendency to do that sort of thing if our construction of the order of the Fuel Administration is not the correct one.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Application for Refund from Municipal Pension Fund.

November 8, 1920.

TO THE BOARD OF TRUSTEES OF THE MUNICIPAL PENSION FUND
OF THE CITY OF CHICAGO.

Gentlemen:

We are in receipt of your communication asking us for an opinion on the application of the heirs of Frank Stella, section foreman, Bureau of Streets, for a refund.

From your communication it appears that Stella on May 4, 1918, applied for and was granted a pension under the disability provisions of the statute and received as a pension the sum of \$399.35, which was paid to him at the rate of \$38 per month from May 4, 1918, until he reported back to work March 2, 1919. Mr. Stella died on September 15, 1920, and the question you desire us to answer is whether or not his estate is entitled to a refund of 50 per cent of the amount he had contributed to the fund during his lifetime. From your communication it appears that Stella contributed \$239 to the pension fund, and during his lifetime received benefits amounting to \$399.35.

In reply, we beg leave to advise you that Section 4 of the Municipal Pension Fund Act, in so far as it applies to cases of this kind, reads as follows:

“SECTION 4. Said board shall have the power and it shall be its duty * * *

“*Sixth*: To authorize the payment to any employe who may be separated from the service of any such city, village or town by the abolishment of his or her position before such person shall have qualified for a pension of an amount equal to the amount deducted from the salary or wages of such employe and applied to the fund hereby created, to any employe who may be separated from the service of such city, village or town by resignation or discharge before such employe shall have qualified for a pension, and to the heirs and legal representatives of any employe who shall die while in the service of any such city, village or town of an amount equal to one-half of the amount deducted from the salary or wages of such employe and applied to the fund hereby created; provided that all such employes and the heirs and legal

representatives of any deceased employe shall release such board from all future liability upon receipt of such amounts."

From a careful reading of the foregoing provisions of the statute we are compelled to rule that the heirs and legal representatives of employes who shall have died while in the service of the city are entitled to a refund of an amount equal to one-half of the amount deducted from the salary or wages of such employe and applied to the pension fund.

It is, therefore, our opinion that the estate of Frank Stella is entitled to a refund of 50 per cent of the amount contributed by Stella in his lifetime to the Municipal Pension Fund.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Interpretation of New Section of Municipal Pension Fund Act.

November 8, 1920.

THE BOARD OF TRUSTEES OF THE MUNICIPAL PENSION FUND OF
THE CITY OF CHICAGO.

Gentlemen:

Replying to your communication requesting a written opinion construing Section 9½ of the Municipal Pension Fund Act as amended July 1, 1917, in so far as it pertains to the amount that the applicant for a pension shall be required to contribute to the fund before he shall be entitled to a pension, we beg leave to advise you that the said section provides that:

"Any employe under civil service who shall have been in the service of such city, village or town for a period of not less than ten (10) years and who was engaged in the military or naval service of the United States during the years of 1861, 1862, 1863, 1864 and 1865 and who was honorably discharged therefrom, and

who is sixty-five (65) years or more of age, shall have the right to retire from the service of such city, village or town and become a participant and beneficiary hereunder at any time after July 1, 1916; *Provided, that no pension or benefit shall be paid to any such employe unless such employe shall on before the date of his retirement from the service (or in the event that he does not retire before January 1, 1918) on or before that date pay to the treasurer of such city, village or town for the benefit of the pension fund hereby created a sum equal to the full amount which would have been deducted from his salary or wages during the period of his employment since July 1, 1911, and applied to said pension fund if such employe had been a participant in said pension fund during the said period of employment. In determining the amount so to be paid credit shall be given for any moneys deducted from the salary or wages of any such employes and applied to said pension fund during the period of employment herein stated. Provided, further, that any such employe referred to in this section who shall retire from the service of such city, village or town before deduction shall have been made from the salary or wages of such employe for a period of twenty (20) years shall agree to pay into said fund, without interest thereon, the sum which, together with all moneys previously deducted from the salary or wages of such employe, is equal to the full amount which would have been deducted and applied to the said fund during a period of twenty years. Such sum so to be paid shall be deducted by the treasurer of such city, village or town in equal monthly installments of ten dollars each, from the benefits due and payable to such employe at the regular times for the payments of said benefits after he shall become a beneficiary hereunder.*

"It is the purpose and intent of this section that its provisions shall apply only to persons who were engaged in the military or naval service as aforesaid, and that it shall in no way repeal or affect any of the other provisions of this act."

From your communication it is clear to us that what you desire to know is the amount of money you should require applicants applying for benefits under this section to contribute. The law as originally passed provided that the pension fund should consist of two dollars a month retained or de-

ducted by the comptroller of such city, village or town from the salary or wages of such employe. On July 1, 1917, this section was amended so as to provide for the deduction of \$2.50 each month.

From your correspondence it appears to us that you are of the opinion that persons applying for a benefit under the provisions of Section 9½ should be required to contribute at the rate of \$2.50 per month during the period of their employment prior to July 1, 1917, and you appear to have made this ruling in the case of Dr. Murdoch.

It will be observed from a reading of Section 9½ that an applicant for benefits thereunder is required to pay to the treasurer of such city, village or town for the benefit of the pension fund thereby created a sum equal to the full amount which would have been deducted from his salary or wages during the period of his employment since July 1, 1911. Up to July 1, 1917, the only amount authorized by law to be deducted was the sum of \$2 per month. On July 1, 1917, an amendment went into effect raising this amount to \$2.50 per month, but deductions at the rate of \$2.50 per month were not authorized and could not be made until July 1, 1917.

It is an elementary proposition that statutes must not be construed as retroactive in effect unless it appears clearly from the text that such was the intention of the General Assembly, and we are unable to find any language in this act that would warrant us in holding that the Legislature intended this section to be construed as retroactive. On the contrary, it is clear that the Legislature had no such intention.

In computing the amount to be deducted from applicants for benefits under this section it is your duty under the law to figure the same on a basis of \$2 per month for the period of time prior to July 1, 1917, and at the rate of \$2.50 per month subsequent to July 1, 1917.

Yours truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Fifty Ward Law.

November 13, 1920.

HON. ANTON J. CERMAK, Chairman, Committee on Revenue,
Compensation and Elections.

Dear Sir:

In reply to your letter of the 9th instant, requesting an opinion as to when the so-called fifty ward law becomes operative with reference to the election of aldermen, we are of the opinion that said law became operative upon its adoption November 2, 1920.

Section 1 of Part Four of the act contains three alternative provisions with reference to the election of aldermen.

Paragraph (a) concerns the election of aldermen in the event that the act had been adopted so as to apply to the election of aldermen in 1920.

Paragraph (b) concerns the election of aldermen if the act should become operative in time to govern the election of aldermen in 1921, and paragraph (c) concerns the election of aldermen if the act should become operative at any time subsequent to the time provided for in paragraphs (a) and (b).

You will therefore see that paragraph (b) contains the provisions applicable to the present situation.

This paragraph (b) provides that one alderman shall be elected from each ward at the general election for aldermen in the year 1921, but no general election for aldermen shall be held in the year 1922, it being the purpose of this act that the Council shall be composed of one alderman from each ward after the expiration of the terms of aldermen elected at the general election for aldermen in the year 1920.

Section 3 of Part Five of the act provides that within three months after the adoption of the act by the voters the City Council shall pass an ordinance redistricting the city into fifty wards, and that all elections of aldermen shall be held from the present wards until a redistricting is had as provided for in this act.

Section 4 of Part Five provides that no such redistricting ordinance shall take effect until the expiration of 15 days after its passage, within which time one-fifth or more of the aldermen who did not vote to pass such redistricting ordinance may file with the city clerk a proposed substitute ordinance together with a petition signed by them demanding that the question of the adoption of the redistricting ordinance and of the substitute ordinance be submitted to a vote of the people. More than one such substitute ordinance may be submitted but no alderman shall have the right to sign more than one petition. The city clerk will then certify to the Board of Election Commissioners all such ordinances, and said commissioners will submit the same to a vote.

Section 5 of Part Five provides that in the event the Council fails to redistrict the city, one-fifth or more of the aldermen may file with the city clerk an ordinance redistricting the city, together with a petition signed by them demanding that such ordinance be submitted to the legal voters at the next election in and for the entire city, to be held not less than 40 days after the filing of such ordinance and petition. The city clerk shall then certify to the Board of Election Commissioners and the Board of Election Commissioners will submit such question to a vote.

Should the City Council pass an ordinance redistricting the city into fifty wards and no substitute ordinance be filed with the city clerk, 50 aldermen will be elected from the wards so created for a term of two years. Aldermen elected in 1920 may become candidates, and if elected and qualified would abandon their old offices of aldermen and be qualified as aldermen under the fifty ward law. Any such aldermen having one year still to serve who do not become candidates or who are not elected aldermen under the fifty ward law will hold office until their term of office expires in 1922. Should the City Council pass a redistricting ordinance and a substitute ordinance be filed with the city clerk, or should the City Council not pass any redistricting ordinance and an ordinance for redistricting be filed with the city clerk under Section 5 of Part Five, the question of redistricting

the city would be submitted at the municipal election to be held on the last Tuesday of February, 1921. The aldermen elected on said date would be elected from the present wards for a term of two years, and as no election will be held under the fifty ward law in 1922, the City Council would, after April, 1922, be composed of the 35 aldermen elected in 1921 alone.

Respectfully submitted,
 GOTTHARD A. DAHLBERG,
Assistant Corporation Counsel.

Approved:
 SAMUEL A. ETTELSON,
Corporation Counsel.

Submission of Budget to a Referendum.

November 15, 1920.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

In response to your request for an opinion as to whether the City Council can submit a budget to a referendum and whether such budget will be legal if it exceeds the estimated resources, we submit the following:

We assume that when you speak of a "Budget" you have reference to the Annual Appropriation Bill for the city; and that by submission to a referendum you mean that the voters shall vote on the question of such bill becoming a law.

The duty and responsibility of passing the Annual Appropriation Bill rests upon the City Council. This is a mandatory provision of the law. (Art. VII, Sec. 2 of Cities and Villages Act.)

The section in question says that the City Council, "*shall*, within the first quarter of each fiscal year, pass an ordinance, to be termed the annual appropriation bill," in which it "*may* appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation." A strict interpretation of this language makes it clear that the City Council must pass the ordinance

and that the amounts to be appropriated are to be determined by this body and not by the voters of the city or by any other officer of the city. Even the comptroller acts only in an advisory capacity to the City Council, as will appear from Section 17 of the same article, where it is made the duty of the comptroller to submit estimates "to the end that the City Council or Board of Trustees may fully understand the money exigencies and demands upon the corporation for the current year."

There is a provision in the law for a referendum in case it is desired to make further appropriations after the time for passing the annual appropriation bill has gone by, but the very fact that a referendum is thus provided for under such circumstances, makes it all the more clear that it was not the intention of the Legislature to have a referendum for the purpose of passing the appropriation ordinance that must be passed by the City Council.

It may be said that some form of question involving an expression of opinion by the voters can be submitted under the public policy act passed in 1901. If any question is framed for this purpose, however, the only way it can be placed on the ballot is by a petition of twenty-five per cent of the registered voters. In any event it is doubtful whether any question of policy can be involved in a case where the law imposes an absolute duty.

With reference to the question whether an appropriation bill will be legal if the amounts appropriated exceed the estimated resources, we have on former occasions advised your committee that the annual appropriation bill cannot be held invalid merely because it exceeds the estimated resources for the current year.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,
Acting Corporation Counsel.

Status of Police Sergeants.

November 16, 1920.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir :

In response to your communication of November 15, wherein you state :

“I understand that the decision of the Supreme Court permits me to interchange detective sergeants, patrol sergeants and desk sergeants at will.

“Will you please let me know today whether I can do this?”

we submit that an ordinance passed March 10, 1920, provides in part as follows:

“1907. There is hereby established an executive department of the Municipal Government of the City of Chicago, which shall be known as the Department of Police, and shall embrace a superintendent of police * * * and such number of * * * patrol sergeants, desk sergeants, detective sergeants, * * * as may, from time to time, be provided for in the annual appropriation ordinance.”

“1910. The superintendent of police shall be appointed by the mayor, with the advice and consent of the City Council. He shall in accordance with the provisions of this ordinance, have the management and control of all matters relating to said Department of Police, its officers and members.”

“1919. The superintendent of police shall, from time to time prescribe such rules and regulations for the police department as he shall deem necessary and proper. All officers and members of said department shall be subject to such rules and regulations. The superintendent of police, in such rules and regulations, shall provide for reasonable and proper penalties, for any neglect of duty or misconduct on the part of any member of said department.”

The annual appropriation ordinance for the year 1920 provides that sergeants be paid a yearly salary of \$2,392, and detective sergeants a yearly salary of \$2,092. By subsequent amendment to said ordinance the yearly salary of a sergeant is fixed at \$2,400, and that of a detective sergeant at \$2,100.

In connection with the foregoing it is worthy of note that, notwithstanding the provisions of said Sections 1907 and 1909, the City Council did not create the several offices entitled "patrol sergeant" and "desk sergeant," but did create and appropriate for the position of "sergeant."

Pursuant to the provisions of the Civil Service Law and Rules, it appears that the office or position of "detective sergeant" and that of "sergeant" are now included in Grade II, Class D, police service. And, in view of the foregoing provisions of the ordinance passed March 10, 1920, and the annual appropriation ordinance for this year, we consider that, for the purpose of this communication there are but two positions involved, *i. e.*, a detective sergeant and sergeant.

In the case of *People ex rel. Loftus v. Frazier, et al.*, No. 24788, Appellate Court, the relator Loftus, a detective sergeant, sought to secure the right to participate in a promotional examination for the position of lieutenant of police, and relative to any alleged difference in the line and character of work performed by detective sergeants, patrol sergeants, and desk sergeants, the court, among other things therein, said:

"It is conceded that patrol and desk sergeants are in the same line and character of work, and this notwithstanding the fact that each is employed in the performance of a distinctly different service in the department. The evidence shows that patrol sergeants and detective sergeants are generally employed on outside work in the investigation of crime and criminal complaints, while the desk sergeant's work is the keeping of records and accounts within the police stations. There is some apparent detail difference in the work performed by detective sergeants and patrol sergeants, but we do not think that this difference is so marked as that between patrol and desk sergeants. * * *

"It is evident that the relator's eligibility to an examination for a lieutenantancy depends upon what construction is to be given to the phrase 'in the same line or character of work.' The evidence introduced on this question, we think, supports the conclusion of the trial judge. While there is some difference in the duties required of the different kinds of sergeants appropriated for, this difference is not of such character as would war-

rant a finding that each was engaged in a line or character of work different from that of the others."

In conclusion, the court, in the aforesaid case, held in substance that, for the purpose of participating in a promotional examination for the position of lieutenant of police, detective sergeants, patrol sergeants and desk sergeants are engaged in the "same line and character of work." Upon petition for certiorari, the conclusion expressed in the foregoing case was upheld by the Supreme Court.

It is our understanding that the several positions formerly designated as "patrol sergeant" and "desk sergeant," are now included in the civil service classification and the appropriation ordinance under the sole title of "sergeant." Therefore, in view of all the foregoing, it is obviously apparent that the office or position of "patrol sergeant" and that of "desk sergeant" does not exist in law; and that the offices or positions respectively entitled "sergeant" and "detective sergeant" are now in the same class and grade and in the same line and character of work. The mere fact that the City Council has seen fit to entitle one or two positions in the same class and grade and same line and character of work, as "sergeant" and the other as "detective sergeant" would not operate in law to change the classification or legal status of such positions. And likewise the mere fact that there is a difference of \$300 between the salaries appropriated for such positions would not so operate to change the legal status of the same. Had the City Council seen fit to prescribe separate and specific duties for each of such respective positions, then a different situation might exist, but such is not the case.

From a careful perusal of the provisions of said ordinance of March 10, 1920, and especially those contained in Sections 1910 and 1919, thereof, it is apparent that except as otherwise provided in said ordinance, the City Council intended that the superintendent of police should exercise broad powers with respect to the management of the Department of Police and the members thereof, rather than to preclude the exercise of such power and authority as, in the exercise of a sound discretion, the superintendent should deem necessary

and proper for the securement of efficiency and the protection of the public.

Can it be said that where two offices or positions are in the same class and grade and in the same line and character of work, as appears in this case, and by reason thereof the incumbents of such offices or positions have the same promotional rights, that in a matter pertaining to the very purpose for which such offices or positions were created, *i. e.*, proper and efficient police work for the protection of the public there is a distinction in law between the same, which would prevent the superintendent of police from considering such offices or positions to be one and the same office or position for the purpose of performing certain proper police duties? We think not, in the absence of some further showing to that effect than appears herein.

Therefore, in the absence of any law, ordinance or rule of the Civil Service Commission prohibiting the exercise of such powers and authority, and likewise in view of the authority expressly and impliedly conferred upon the superintendent of police, we are of the conclusive opinion that the superintendent of police is authorized to prescribe, by order, rule or regulation, certain particular and specific duties to be performed alike by the persons now designated "sergeants" or "detective sergeants" and to order and assign each and any of said "sergeants" or "detective sergeants" to perform all or any of the duties so prescribed; provided that, such duties come within the scope of the classification known as Grade II, Class D, Police Service, and in the same line and character of work now required by incumbents of offices or positions now included in said grade, class and service. That is to say, you are authorized to prescribe certain required desk duties, patrol duties and detective duties, and then order and assign each and any of said sergeants or detective sergeants to perform certain of such prescribed duties, when and as you may deem it necessary and proper for the securement of efficiency in the department and the protection of the public.

Yours respectfully,

H. C. FOSTER,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Appropriations for Garbage Reduction Plant.

November 18, 1920.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

We are in receipt of your letter concerning the condition of the appropriations for the Municipal Reduction Plant to which was attached copy of a letter of the commissioner of public works relating to the same subject.

It appears from these letters that the appropriations for the Municipal Reduction Plant for the current year are insufficient, that it will require approximately \$118,500 to operate the plant for the remainder of the fiscal year, that unless money for this purpose is appropriated the plant would have to shut down at the close of the day on November 19, 1920, and that there are no appropriations within the Department of Public Works which can be drawn on for purposes of transfer to the extent that is necessary to meet the deficiency.

The question, therefore, is whether the situation presented is an emergency within the meaning of that term as defined in Section 3 of Article VII of the Cities and Villages Act as amended June 24, 1919 (Session Laws 1919, page 252).

The section referred to above now contains a clause which reads as follows:

“nothing herein contained shall prevent the City Council or Board of Trustees from, by a two-thirds vote, making additional appropriations for the purpose of making any improvement or restorations, the necessity for which is caused by any casualty or accident happening after such annual appropriation is made, nor for making expenditures nor incurring liabilities necessary to meet any emergency created by epidemic, happening after and unforeseen at the time of making the annual appropriation, nor from making appropriations necessary to care for such expenditures and liabilities.”

Further on in the same section the word “emergency” as used in the above clause is defined as follows:

“Emergency as used herein means a condition requiring immediate action to suppress, or prevent the spread of disease or to prevent or remove imminent danger to persons or property.”

If it were not for the definition of the word "emergency" that appears in the statute, it would be doubtful whether such a situation as you describe would be within the purview of the clause first quoted, but since the Legislature has taken the pains to define this word so as to embrace any condition requiring immediate action to suppress or prevent the spread of disease it would seem as though the emergency before you comes within the provision of the statute which permits an additional appropriation at this time.

The operation of the Municipal Reduction Plant is so closely connected with the health of the city and the danger of disease arising from an uncleanly condition at this time of the year is so imminent that the failure to continue to operate same might result in serious consequences.

We are, therefore, of the opinion that the City Council will not exceed its powers if it makes provision for operating the plant for the remainder of the year.

We recommend that in preparing the necessary ordinance for that purpose there should be either in the body of same or in a preamble thereto a declaration to the effect that the City Council regards the condition as presenting an emergency which requires immediate action in order to suppress or prevent the spread of disease. While the mere declaration in itself does not make that an emergency which is not in fact one, nevertheless it establishes the fact that the City Council acted on the theory that such an emergency existed and it would have to be so regarded unless the contrary were proven.

Yours very truly,

LEON HORNSTEIN,

Approved: *Assistant Corporation Counsel.*

JAMES W. BREEN,
Acting Corporation Counsel.

Employment of Pensioned Employees.

November 20, 1920.

MR. HARRY G. WILSON, Secretary, The Chicago Public Library.

Dear Sir:

Replying to your favor of October 21, 1920, in which you

state that The Chicago Public Library is desirous of securing for a limited time the services of a former employe who retired from your service and is now a pensioner, and ask us to advise you whether this pensioner can be employed by the Board of Directors of The Chicago Public Library without forfeiting his pension or endangering his rights to remain a pensioner on the pension rolls of the Public Library Employees' Pension Fund, we beg leave to advise you that for the purpose of answering your interrogatories we assume that the pensioner in question has been granted a service pension, *i. e.*, that he has reached the age of 55 years and has completed a service of 10 years prior to the granting of a pension to him from the Public Library Employees' Pension Board.

Our Supreme Court has ruled that, upon the happening of the event which under the law entitles a participant in a pension fund to be granted a pension, as well as upon the granting of the same, the party receiving said pension has a property or vested right therein.

We have carefully read the law creating the Public Library Employees' Pension Fund and do not find any restrictions or limitations placed upon persons who are granted service pensions from such fund.

I recall a case that arose under the Police Pension Fund Law some years ago. The Board of Trustees of the Police Pension Fund granted a service pension to a policeman who had completed a service of 20 years and who had retired from the police force. This retired officer moved out to Morgan Park and became a policeman on the Morgan Park Police Department. After he worked as such for several years Morgan Park became annexed to the City of Chicago, and under the state law the members of the Morgan Park police force became members of the Chicago police force. The Police Pension Board stopped the payment of his pension on the ground that he was in the active service of the City of Chicago as a police officer. He filed a mandamus suit in the Circuit Court and Judge Windes ruled that after his service of 20 years and the granting of a pension to him by the Police Pension Board he had acquired a vested and property right

in the pension and that he could not be deprived of the same by the Pension Board, and directed a mandamus to issue to compel the payment of a pension to this officer.

We are of the opinion that, under the law, the pensioner you refer to in your communication has a right to accept employment from the Chicago Public Library for a limited period as stated in your communication, and that the acceptance of employment by him will not in any way forfeit his right to a pension or endanger his rights to remain on the pension rolls of the Public Library Employees' Pension Fund.

In regard to the second query in your communication, it is our opinion that where an employe has neglected or failed to file a statement of his intention to become a beneficiary under the Public Library Employees' Pension Act within three years from the date of his entering the employ of The Chicago Public Library, he has forfeited his rights to participate in your pension fund. The law is extremely liberal and allows to employes a period of three years within which to determine whether or not they desire to become participants in your pension fund.

After the period of three years has expired there is no power or authority vested in your board to permit employes to become participants in the Public Library Employees' Pension Fund.

Yours very truly,

JAMES W. BREEN,
Acting Corporation Counsel.

Procedure with Respect to Stolen Bonds.

November 23, 1920.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

We hereby acknowledge the receipt of your letter of November 18, wherein you request to be advised concerning the following:

"I am holding in excess of \$3,000 in Liberty Bonds and coupons, belonging to the Hyde Park State Bank,

recovered property which was stolen when the bank messenger was held up. The president of the bank, John A. Carroll, requests that this property be turned over to him.

“Please advise me as to my course of action.”

Inasmuch as we gather from the foregoing statement that the bonds and coupons in question are stolen property, and that you are holding the same as evidence for purposes of criminal prosecution, and in consequence thereof such bonds and coupons are in the custody of the law, we are inclined to believe that you should refuse to surrender the same, except upon the order of the court before which any criminal prosecution for the theft or unlawful possession of such bonds and coupons is pending. But, in the event you are not holding the same as evidence in a criminal prosecution, we are of the opinion that, upon satisfactory proof that such bonds and coupons are the property of the Hyde Park State Bank, and such bank undertakes to hold you harmless, you may surrender the same; otherwise, you should refuse to surrender the same, except pursuant to legal process.

Yours respectfully,

H. C. FOSTER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Duties of Department of Registration and Education Under Plumbing Law.

November 29, 1920.

BOARD OF EXAMINERS OF PLUMBERS, Chicago, Illinois.

Gentlemen:

Your letter of June 14th addressed to Mr. Righeimer, assistant corporation counsel, in which you enclose a copy of the Illinois State Plumbing Law and asking for an opinion stating what the duties of this board to the Department of Registration and Education are according to this law, has been referred to me for reply.

Section 2 provides when application for such a certificate is made to your local board the applicant shall be compelled to pass such an examination as your local board may prepare with the approval of the Department of Registration or, in other words, your local board designates the time and place for the holding of these examinations and prepare the questions and submits them to the State Department of Registration and Education for approval, and upon the approval by the Department of Registration and Education their functions cease unless you are guilty of some violation of some provision of this law and there are no other provisions with reference to the method of conducting these examinations so that the examination can be conducted under such rules as your board might provide.

Section 6 is very clear and in substance provides that in order for the applicant to secure initial certificates he must apply to the local board in his own town and if his city, town or village does not have a local board of examiners then he must apply to the nearest local board of examiners and the local board of examiners keeps and transfers to its city, town or village treasury the fees for such initial examination, but upon renewal of such certificate if the applicant resides outside a city, town or village, which has a local board of examiners, he sends his application for a renewal together with his fees therefor to the Department of Registration and Education, and it transmits the fees so received to the state treasury. The local board of examiners are required by the last sentence of said section to make a report of all original or renewal certificates issued every thirty days. The law says that every certificate issued shall be reported within thirty days from its issue, but your local board might comply with the law by making a report every thirty days.

Section 7 authorizes the State Department of Registration with the advice and acquiescence of the attorney general to institute mandamus proceedings to see that the officers of the city, town or village complied with this law, in other words,

the law creates a local board which conducts these examinations. The State Department itself conducts no examinations but the State Department has the right to approve the questions which are issued by the various local boards.

It does not appear to me that the law contemplates that the State Department of Registration and Education shall dictate just what questions shall be asked, but it reserves the right to disapprove any questions which in its opinion should not be asked so that the local board under the liberal interpretation of the law would seem to have a certain amount of discretion as to what questions or to what form of questions should be given.

Section 6 of the law in reference to the collection and disbursement of the fees by the local boards for the purpose of the city, town or village would confirm the opinion that the State Legislature simply intended by this act to make the administration of the law uniform throughout the state without depriving the various local boards of their right to make such rules and regulations as are necessary for their particular locality providing they did not conflict with the general policy of the State Department in reference to this matter.

So that in conclusion if your questions receive the approval of the State Department and if you make a report every thirty days to the State Department of all original or renewal certificates issued, I am of the opinion that you have complied with the law.

Yours very truly,

MORTON S. CRESSY,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Closing of Premises on Order of Commissioner of Health.

November 30, 1920.

HON. CHARLES C. FITZMORRIS, General Superintendent of Police.

Dear Sir:

In reply to your communication of November 16, 1920, in which you request an opinion on the question of whether or not your department has legal authority to close premises on the request or order of the commissioner of health, it is the opinion of this office that in view of the fact that the Statutes of the State of Illinois have given the power to the City Council of the City of Chicago, to declare what shall be a nuisance and the power to abate the same, your department under the ordinances has legal authority to summarily abate any nuisance upon the request of the commissioner of health.

“Section 1425 provides as follows:

“Sec. 1425. MATTERS AND THINGS DETRIMENTAL TO HEALTH.) No building, vehicle, structure, receptacle or thing used or to be used for any purpose whatever, shall be made, used, kept, maintained or operated in the city, if the use, keeping, maintaining or operating of such building, vehicle, structure, receptacle or thing shall be the occasion of any nuisance, or dangerous or detrimental to health.”

Section 1428 provides as follows:

“Sec. 1428. SUMMARY ABATEMENT.)

“Whenever any nuisance shall be found on any premises within the city the commissioner of health is hereby authorized in his discretion to cause the same to be summarily abated in such manner as he may direct.”

As a part of Section 1410, of The Chicago Code of 1911, the last paragraph thereof provides as follows:

“Said commissioner shall have the power and authority to call upon the Department of Police or upon any member thereof for such assistance as may be necessary to enable him to enforce the provisions of this section, and it shall be the duty of any member of the Department of Police so called upon to render such assistance as may be required of him by said commissioner of health.”

It will be seen, therefore, from the above quoted sections, that it is clearly the intention of the City Council that all departments shall render to the health commissioner, such assistance as may be required in keeping the city in a healthful condition, and if in the opinion of the commissioner of health, the closing of the premises in question is necessary to abate the nuisance maintained there, his order to you would in our opinion be sufficient authority for you to instruct your department to close the same or such parts thereof as are responsible for the nuisance. The determination of such parts properly should be left to the discretion of the Health Department.

Yours very respectfully,

JOHN A. BUGEE,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Liability of City for Extras Under a Contract.

December 17, 1920.

HON. ROSS A. WOODHULL, Chairman, Sub-Committee on Finance.

Dear Sir:

Referring to your communications of May 21 and November 30, 1920, in which you ask whether there is any liability on the part of the city for payment of the claim of Joseph E. Martin for extras on plumbing work in fire engine house at 2323 Natchez avenue. The claim for extra work made by Mr. Martin is for the constructing of about 260 feet of 10 inch sewer from Grand avenue to the new engine house.

In accordance with the report made by Mr. Charles W. Kallal, city architect, to the Committee on Finance on December 13, 1917, which accompanies your communication and which had been verified by our personal examination of the proposals, plans and specifications in the office of the Commissioner of public works, it appears that all the contractors,

which included Mr. Martin, who bid on the work, should base their estimates in accordance with the plans and specifications. The plans, specifications and proposals to do the work show and specify the following:

“Scope of Work.

“Section 23. Work included under this heading includes all labor and material requisite for the installation of the entire gas-fitting, plumbing and sewerage system hereafter specified, and as is shown on drawings or may be necessary for the satisfactory operation of the service.”

Section 27 of the specifications, which provides for all sewer connections, is as follows:

“Sewer Connections.

“Section 27. Do all excavating, refilling for the sewer connections and connect house sewer with 6-in. vitrified, salt glazed, hub joint, best quality pipe, and extend to new 10-in. sewer at street.

“Section 27-A. Lay a 10-in vitrified sewer in Natchez avenue from the main sewer in Grand avenue to a point in front of the building. All to be laid according to the rules and regulations of the Sewer Department. Pipes to be laid to a true grade of not less than $\frac{1}{4}$ -in. to the foot and joints made tight with Portland cement.”

The plans and drawings No. 10 of 10 which form a part of the specifications, show plainly a 10-in. sewer was to be included in the work.

The proposal executed by Mr. Martin under which he bid and proposed to do the plumbing, drainage, and gas fitting work, contained the following clause:

“The undersigned further agrees to furnish in every respect all work in the manner shown on plans and specifications within 30 days from date of notification to proceed with the work.”

Under Section 23 of the specification above quoted, which relates to the scope of work, it is provided that the contractor is to furnish all labor and materials requisite for the installation of the entire sewer system as specified and shown on the drawings.

Section 27 required that the contractor do all excavating,

re-filling for sewer connections and connect house sewer with 6-in. vitrified, salt glazed, hub joint pipe, and extend the same to the *new 10-in. sewer at street*. The *new sewer* is the one provided for under Section 27-A of the specifications above quoted, which is to be a 10-in. vitrified sewer and to be laid in Natchez avenue from the main sewer in Grand avenue to a point in front of the fire engine house and which is also shown on the plans or drawings designated No. 10 of 10, and which form a part of the specification.

Under the proposal, contract, plans and specifications executed by Mr. Martin, he agrees that all such work shall be done in accordance with the plans prepared for doing of the same on file in the office of the Department of Public Works and specifications appended thereto, and made a part of the contract, and all of the work was to be completed for the consideration of \$1,660.

We are, therefore, of the opinion that the claim of Mr. Martin for extra work amounting to \$561 for laying of 260 feet of 10-in. sewer is included in the original contract and for which the city is not legally liable for the payment of the same.

Yours very truly,

BENTON F. KLEEMAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Removal of Dangerous Trees.

December 17, 1920.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

We desire to reply to your communication of November 5, in reference to dangerous trees located on private property inside the sidewalk line, in which you ask if it is within the jurisdiction of the Bureau of Parks, Play-grounds and Bathing Beaches to compel property owners to remove dangerous trees on their property.

From your communication, we are not informed of any facts as to what you term a dangerous tree on private property. A tree may be dangerous if infected with insects or other pests, or diseases which may injuriously affect trees, plants, or shrubs that are now growing on streets or public highways of the city, or may be dangerous by reason of the trunk of the tree being dead or decayed so that its condition may by storm cause same to fall upon the streets or highways of the city. Whether the same is dangerous so that it may be necessary to cause its removal to prevent an accident which may result in damages, is a fact in each particular case, based upon the knowledge of the city forester or some person who is learned in the science of forestry.

Section 1724 of Article III of Chapter LII entitled, "Parks, Play Grounds, Bathing Beaches and Street Tree Planting," Page 585, City Code of 1911, prescribes the duties of property owners with reference to trees and is as follows:

"The owner or owners of every lot or parcel of land in the City of Chicago upon which any tree or trees are now or may hereafter be standing shall trim or cause to be trimmed the branches thereof so that the same shall not obstruct the passage of light from any gas lamp or other light located in any street, alley or public highway in the City of Chicago to the adjacent street and sidewalk; and such owner or owners shall trim all branches of any tree or trees now or hereafter growing on their premises which overhang any street, alley or public highway, so that there shall be a clear height of ten feet above the surface of the street, alley or highway unobstructed by branches, and such owner or owners shall remove from such tree or trees all dead, decayed or broken limbs or branches that overhang such street, alley or highway, and when any of such trees are dead, such owner or owners shall remove the same so that they shall not fall in the street, alley or public highway. Any person who shall fail to comply with any of the provisions of this section within fifteen days after notice from the city forester of the particular thing to be done under this section shall be subject to the payment of the fine designated in Section 1738 hereof."

Under the above section, the owner or owners of the property shall trim all branches of any tree or trees now or here-

after growing on the premises which overhang any street, alley or public highway so there shall be a clear height of ten feet above the surface of the street, alley or public highway unobstructed by branches and shall remove dead, decayed or broken limbs or branches that overhang such street or highway, and when such trees are dead, the property owner shall remove the same so that they shall not fall in the street, alley or public highway. After fifteen days' notice shall have been given by the city forester to the property owner of the particular thing to be done, the property owner shall be subject to the payment of a fine if the provisions of this section are not complied with.

Section 1738 of the same article, on pages 587 and 588 provides as follows:

“Any person who violates any of the provisions of this article shall be punished by a fine of not less than five dollars nor more than one hundred dollars for each offense.”

Yours very truly,

BENTON F. KLEEMAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Liability of City on Claim for Extras.

December 18, 1920.

HON JOHN A. RICHERT, Chairman, Committee on Finance,
City Council.

Dear Sir:

In the matter of the desired opinion as to the legal liability of the City of Chicago in the claim for extra compensation of the Concrete Dock & Construction Co. in connection with its construction of the substructure of the Lawrence Avenue Bridge under a certain contract with the City of Chicago under date of April 10, 1917, you will please find attached the file and correspondence relative thereto which was referred to this office with your communication of October

8, 1920. We find from the files and correspondence that the amount claimed by the contractor is \$25,622.22. Said sum purporting to be a net loss suffered by the contractor of \$17,585.22 by reason of the extra price of material which the contractor claims he was compelled to pay on account of the unsettled condition of the material and labor markets caused by the late world's war, plus \$8,037, 10 per cent of the total cost of the work.

We are of the opinion that there is no legal liability on the part of the City of Chicago for the following reasons: Section 2102 of The Chicago Code of 1911, as amended by ordinance on the 11th day of April, 1911, page 4487, Council Proceedings of said date, entitled "Contracts, Additional Compensation" provides that:

"No extra work, labor or materials, or alterations in the plans or specifications shall be ordered or authorized by the commissioner of public works or by any officer or agent of the city which will involve the expenditure of any money over and above the amount fixed as the contract price in and by such contract, unless the express authority of the City Council be first procured for such extras or alterations and for the expenditure of the amount to be paid therefor."

And paragraph 3 of page 7 of this particular contract under which this work was done, provides as follows:

"It is expressly understood and agreed that no payment shall be made to said party of the first part for any extra work or material or of any greater amount of money than is herein stipulated to be paid, unless some changes in or additions to the contract requiring additional outlay by said party of the first part shall first have been expressly authorized by the City Council of the City of Chicago and ordered in writing by the said commissioner of public works."

Our courts hold that where the manner of procuring and making payments for extras of this sort are prescribed by ordinance, the city is not legally liable unless the particular manner prescribed by the ordinance is adhered to.

In the matter of this claim we find that in addition to said ordinance the contract itself specifically provides the manner

in which additional compensation could, if at all, be obtained.

Yours very truly,

WM. W. SMITH,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Status of Alley as Public or Private.

December 23, 1920.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

Your communication of December 20, 1920, addressed to the corporation counsel, requesting an opinion as to whether the alley referred to in the communication of Gardner G. Coughlan, architect, is a public or private alley, and whether or not Section 652-M of the Revised Building Ordinances would apply to the balconies to be erected in connection with the building mentioned therein.

This opinion is based on information furnished us by H. Borland, the agent of Ascher Brothers. The legal description and location of the alley in question is described as follows:

The west ten (10) feet of the east twenty (20) feet of the north ninety (90) or ninety-one and one-half ($91\frac{1}{2}$) feet of lot seven (7) in block thirty-seven (37) in the original town of Chicago. Block thirty-seven (37) being bounded by Washington street on the south, Randolph on the north, Dearborn street on the west, and State street on the east, and lies in the south half of Section nine (9), Township thirty-nine (39) North, Range fourteen (14) East of the 3d P. M. in Cook County, Illinois.

The Supreme Court of Illinois in the year 1901 passed upon the question as to whether the above described strip of land is a private alley or a public alley. The court in its opinion at page 446 said:

“Where the owners of land devoted a portion of it for use as an alley or passageway for their own

private purposes, such alley or passageway will not be converted into a public highway simply because the public also use it by permission from the owners."

And in the same case at page 452 the court said:

"But as there is no evidence in the record of any user of the alley by the city or by the public for the purpose of passage and re-passage, these circumstances unaccompanied by such user are not sufficient to establish ownership of the alley in the city, or to fix its character as a public alley."

City of Chicago v. Borden, 190 Ill. 430.

Washburn in his work on easements and servitudes (2nd Ed., p. 184) (quoted with approved in the *City of Chicago v. Borden*, *supra*), says:

"And where a way is opened as a private way and intended as such and this can be shown, no length of use by others will make it a public way."

We are, therefore, of the opinion that the above described strip of land is a private alley and that Section 652-M of the Revised Building Ordinances does not apply to the balconies to be erected in connection with this particular building.

Respectfully submitted,

CARL F. LUND,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Payments from Chicago Surface Lines.

December 31, 1920.

HON. WILLIAM HALE THOMPSON, Mayor.

Dear Mr. Mayor:

You have handed us a letter dated December 30, 1920, to you from Henry A. Blair, president of Chicago Surface Lines; and also a like letter, dated December 29, 1920, which was enclosed with the former letter. We return both letters herewith.

You have asked our advice regarding the legal questions involved in the subject matter of these letters.

1st. Mr. Blair writes that "under the terms of the ordinance (meaning the contract-ordinance of February 11, 1907, between the city and the Chicago Railways Company) the company desires the city comptroller to indorse thereon (meaning certain bonds of said company) the certificate required, having in all respects complied with the ordinance and with the law relating to the authorization of bonds."

The city claims that the company has broken, repudiated and refused to live up to this contract-ordinance in particulars essential to the welfare of the people; and that because of such action of the company, said contract-ordinance has been abrogated in its entirety.

Obviously, the city comptroller can not indorse a certificate upon bonds under an ordinance which has been abrogated and is no longer in force.

Mr. Blair also wires: "Based upon the certificates of the Board of Supervising Engineers, the Chicago Railways Company has obtained the authority required by law for the issuance of bonds." But he overlooks the fact that the Board of Supervising Engineers existed solely by virtue of the ordinance and has no powers independently thereof. Hence, the ordinance being abrogated, certificates issued by said board are mere nullities.

2nd. Mr. Blair offers to pay to the city the \$1,447,352.93 recently tendered the city as its 55 per cent of the net divisible receipts under the contract-ordinances between the city and the Chicago Surface Lines and to enter into a stipulation under which the acceptance of said sum will be without prejudice to the city. We think that this can be accomplished. Manifestly the city would be prejudiced if it accepted said sum under the contract-ordinance because, by doing so, it would waive its insistence that the ordinances have been abrogated on account of the breach and repudiation of them in essential particulars by the Surface Lines. But the companies ought to pay this \$1,447,352.93 to the city as compensation for the use of the streets during the year 1919. So we propose a stipulation to the effect that the Surface Lines will

pay this sum to the city as such compensation independently of any contract or ordinance; and that the city's right to insist that the contract-ordinances have been and are or, at the election of the city may be, abrogated, on account of the breach and repudiation of them by the Surface Lines, shall be, in no way or to the slightest extent, prejudiced by accepting said sum. If this will be satisfactory to their Mr. Blair, we will draw up a formal stipulation for his companies to sign.

Yours respectfully,

CHESTER E. CLEVELAND,

Special Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Liability of City for Damage Done by Garbage Wagon.

December 31, 1920.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

Your communication of November 26, 1920, with attached claim of Kennedy Ryan, together with council order in which you ask for an opinion as to the city's liability received.

In reply thereto, we beg to say that we find from the statement that the damage was occasioned by a wagon employed in the removal of garbage for the Department of Streets running into claimant's building.

It is a well settled principle of law that a municipal corporation engaged in the performance of a public service in which it has no particular interest, or receives no special benefits in its corporate capacity, but which it is bound to see that it is performed in pursuance of a duty imposed by law for the general welfare of its inhabitants, and that persons employed in the performance of such duties, though employed by the corporation, act as public officers charged with a public duty. The doctrine of our courts seems to be that a municipal corporation is not responsible for the negligence of its agents in the performance of public duties.

Love v. City of Atlanta, 92 Ga. 129.

I am, therefore, of the opinion that the city is not legally liable for the alleged damage.

Very truly yours,
THADDEUS F. KUFLEWSKI,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

City Vehicle Licenses.

January 3, 1921.

HON. WILLIAM H. WESBEY, City Collector.

Dear Sir:

Your communication of December 20th, addressed to the corporation counsel, requesting an opinion as to whether it would be necessary for a person who owns two automobiles of the same class, 35 H. P. or less, or more than 35 H. P., only one of which would be operated at the same time, shall be required to obtain a city vehicle license for each car, it being understood that he had procured a state license for each car, has been referred to me for reply.

Section 2717 of The Chicago Code of 1911 provides as follows:

“It shall be unlawful for any person, firm or corporation to use, or to cause or permit any of his or its agents or employes to use, any wagon or other vehicle in the transportation of persons or property upon the streets, avenues or alleys of the city, unless such wagon or vehicle be licensed as hereinafter provided; provided, however, that this article shall not be construed as applying to street cars running on metallic rails.”

Section 2718 of The Chicago Code of 1911 further provides that a person shall file an application, and among other things must describe, “the wagon or vehicle.”

Line 13 of the same section provides:

“a license which shall be attested by the city clerk authorizing the use of such wagon or vehicle within the city, until the expiration of such license.”

From the foregoing sections the intention is clear that a license shall be procured for each vehicle.

Section 2717 and Section 2718 of The Chicago Code of 1911 set out the general provisions in the ordinance. Section 2720 of The Chicago Code of 1911, paragraph 2, sets out an exception to the general rule.

It is a well established principle that where a general rule is laid down and an exception to it later set out—that the general rule must be adhered to except in the cases that fall within the exception.

Section 2719 of The Chicago Code of 1911, as amended February 18, 1920, and further amended August 26, 1920, in part reads as follows:

“Whenever the owner or owners of any vehicle licensed under this ordinance shall, before the expiration of such license, sell or otherwise dispose of such vehicle, and notifies the city collector of such sale as hereinbefore provided, and thereafter acquires another vehicle of the same class as that for which said license was originally issued and desires to use the said license on the new vehicle, such owner or owners shall make application to the city collector for transfer of such license, giving such detailed description of the new vehicle as the city collector shall require; whereupon it shall be permissible, upon payment of a transfer fee of one dollar to the city collector, for the city clerk, upon notification by the city collector of the payment of such transfer fee, to authorize the transfer of such license to the vehicle designated.”

This section further shows that the City Council intended that it shall be necessary to procure two licenses because under this provision it is obligatory to use the license for the specific car for which it was issued.

I am therefore of the opinion that it is necessary for a person owning two automobiles of the same class or otherwise, to procure a license for each one of the automobiles.

Respectfully submitted,

ROBT. C. O'CONNELL,
Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,
Acting Corporation Counsel.

**Liability of Surety Company on Bond Where Premium
Is Unpaid.**

January 7, 1921.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

We are in receipt of your letter of recent date in which you inquire whether the city could recover from a surety company where liability existed under a bond running to the city on which the city had failed to pay the premium.

We are of the opinion that an action could be maintained under such circumstances unless the surety company had served notice of cancellation of the bond prior to the time that the liability accrued.

The Supreme Court of this state holds that a bond which is issued by a surety company guaranteeing the fidelity of a person holding a public or private place of trust is an insurance contract, and is subject to the rules of construction applicable to insurance policies generally and not to the rules applicable to ordinary sureties for accommodation.

People ex rel. Kasson v. Rose, 174 Ill. 310.

U. S. F. & G. Co. v. First Nat. B. of Dundee, 233 Ill. 475.

The rule with respect to liability where the person insured fails to perform his part of the contract is as follows:

“A recovery can not be had by an indemnitee who has not performed a covenant which by the terms of the contract is a condition precedent to any liability on the part of the indemnitor. But a different rule is applicable to an independent covenant on the part of the indemnitee and the question whether the covenant is dependent or independent is to be determined by a consideration of the contract in its entirety.”

.22 Cyc. 93.

In order to make this distinction clear, we point, as an instance of a dependent covenant, to a life insurance policy which stipulates that a premium should be paid within a certain fixed time in order that the policy may remain in force; while on the other hand, where an agent receives a policy and

delivers it, giving credit to the insured and taking the latter's note therefor, there is an independent covenant which is not affected by the recitals in the policy. (*Devine v. Federal Life Ins. Co.*, 250 Ill. 203.)

Where the city accepts the bond of a surety company and agrees to pay a premium in due course, the surety company can not escape liability in case of a loss merely because the premium has not been paid, because the agreement to pay the premium in such a case constitutes an independent covenant.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Lease of Space on Municipal Pier for Pageant of Progress.

Chicago, January 8, 1921.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

In response to your verbal request for an opinion as to your rights as an official of the Chicago Boosters Publicity Club, to join in a lease under which this club will be a sub-tenant of a party who rents a portion of the Municipal Pier, we submit the following:

After full consideration of the facts as stated below and their applicability to the statute prohibiting officers from contracting with the city directly or indirectly, we are of the opinion that it will not be contrary to law if you sign such lease on behalf of the organization mentioned.

The statute prohibiting city officers from having any personal interest in any business dealings of the city reads as follows:

“§ 7. No officer shall be directly or indirectly interested in any contract, work or business of the city, or the sale of any article, the expense, price or considera-

tion of which is paid from the treasury, or by any assessment levied by any act or ordinance; nor in the purchase of any real estate or other property belonging to the corporation, or which shall be sold for taxes or assessments, or by virtue of legal process at the suit of said corporation."

(Cities and Villages Act, Art. VI, Sec. 7.)

The above section has been held to be merely declaratory of the common law, under which officials of municipal corporations have always been prohibited from being beneficially interested in contracts upon grounds of the highest public policy. (*McCarthy v. Bloomington*, 127 Ill. App. 215.) Neither the common law nor a statutory provision of this kind, however, is held to be applicable where there is no beneficial interest on the part of the officer, otherwise the provision could be strained to the point of absurdity. For instance, the provision that an officer can not be directly or indirectly interested by any assessment levied by an ordinance, will not be construed to render invalid an ordinance providing for a special assessment merely because an officer of the city has property that is affected. (*White v. City of Alton*, 149 Ill. 626-632.)

A reasonable construction of the statutory provision is that a contract will be invalid where an officer has an interest of such a character as to conflict with or be inconsistent with his official duties. But a remote interest that can not have a bearing on his actions as a public officer will not be construed as within the purview of this statute.

Seward v. Revere Water Co., 201 Mass. 453.

Escondido Lumber Co. v. Baldwin, 2 Cal. App. 606.

Contra Costa Co. v. Soto, 138 Cal. 57.

State v. Passaic, 63 N. J. L. 208.

The facts in the case presented to us do not indicate even a remote beneficial interest. We are informed that the facts are as follows:

A portion of the Municipal Pier has been let to one Henry J. Kramer for a period of five and one-half years, at a stipulated rental, for purposes of storage, exhibitions, etc. The space so rented is peculiarly adapted to the needs of the

promoters of the forthcoming "Pageant of Progress," to be held next August and September. Kramer is the only one who has any interests in this enterprise for personal gain. He has joined in the promotion of the enterprise with the Chicago Hostess Publicity Club and the Chicago Training School for Home and Public Health Nursing, both of which are Illinois corporations not for pecuniary profit. Kramer proposes to sublet spaces on the pier of the Chicago Boosters Publicity Club for purposes of exhibitions, advertising, etc., for a period of one month only, with the possibility of a similar subletting of one month to each subsequent year. The profits of the enterprise will be divided equally between Kramer, who assumes all liabilities, and the two corporations. These two corporations will use such profits for their activities, which are of a public nature.

It has not yet been determined whether the Pageant of Progress will be an independent corporation or whether the three contracting parties will act by agreement as above outlined. But whether or not there is such incorporation has no bearing on the question at issue, which is whether you, as president of the Chicago Boosters Publicity Club, can enter into such a contract with Kramer. Obviously, it makes no difference whether you make such contract with Kramer directly or with a new corporation formed hereafter.

The fact that the Chicago Boosters Publicity Club is in its nature a public enterprise, designed to benefit the city, from which neither officers nor members derive a profit, seems conclusive on the point that you have no beneficial interest which can in any way conflict with your duties as mayor of Chicago. Incidentally, it may also be said that the authorities cited above hold that such a subletting as is proposed would not constitute a case of indirect contract with the city, since the original lessee's tenure or the amount of compensation that he pays do not depend on the subletting.

We therefore beg to advise you that there is nothing contrary to law in the proposed contract between the Chicago Boosters Publicity Club and Kramer, and that you, as presi-

dent of the said corporation, have the right to sign the proposed lease.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Claim of Selz, Schwab & Co.

January 10, 1921.

HON. JOHN A. RICHERT, Chairman Committee on Finance.
Dear Sir:

We are in receipt of your letter of recent date, to which were attached council papers relating to the claim of Selz, Schwab & Co. for compensation for damage to merchandise sustained on September 5, 1920. You ask for an opinion as to the city's liability in the matter.

Complaint was made by this concern to the Bureau of Water immediately after the damage spoken of occurred. The matter was referred to this department, and the writer caused an investigation to be made at once. The following facts were ascertained:

There was a violent rainstorm early in the evening on Sunday, September 5, 1920, which flooded Market street in front of the premises of Selz, Schwab & Co. At the very edge of the gutter next to the sidewalk in front of the premises in question, there is a buffalo box which extends to the basement occupied by Selz, Schwab & Co. This buffalo box is located at the lowest part of the street. The cover was off at the time of the rainstorm. How long the cover was gone no one is able to say. The buffalo box is under the control of the city. The water rose to a point where it was higher than the buffalo box, flowed down the hole thus left open and flooded the basement until there were about six inches of water standing therein. The place affected was the shipping room, which extended partly under the sidewalk and through the

building to the rear. There were large numbers of boxes standing on the floor ready for shipment. The water penetrated these boxes and such goods contained therein as touched the water level or were below it were damaged.

At the time the writer visited the premises, the shoes, slippers, etc., that were damaged were spread out with fans playing on them over a large part of one of the floors of the building. The ends of the boxes and water soaked cartons were shown so that it was easy to get a fair impression of the extent and nature of the damage.

We retained Mr. Thaddeus P. Stanwood, a member of the firm of Guthmann, Carpenter & Telling, as an expert, to make an appraisal of the damage. Mr. Stanwood was recommended as thoroughly competent and we obtained a report from him without delay. In his report he estimated that the damage to the merchandise was \$1,343.55. He did not make any allowance for cost of new flooring, which is put in the claim of Selz, Schwab & Co. at \$250.00. The total claim of Selz, Schwab & Co. is \$1,561.75. Hence, it appears that the claim is for actual damages only and that there has been no attempt made to secure more than the actual damage from the city.

The question of liability of a municipal corporation for damage caused by surface water is one that has been discussed in innumerable decisions.

Dillon, in his work on *Municipal Corporations* (5th Ed., Sections 1731 to 1747), makes an exhaustive analysis of these decisions, and lays down certain rules which are looked upon as a fair and comprehensive statement concerning the liability of municipalities under such conditions.

Dillon says that where the municipality keeps within the limits of its streets, the injury caused by surface water is wholly incidental to and consequential upon the exercise of the city's powers, so that there is no common law liability unless there are extraordinary circumstances. Where the injury is caused by the plan of the improvement as distinguished from the mode of carrying the plan into execution, there is not ordinarily any liability, but there will be liability if the direct effect of the work is to collect an increased body

of water. In such cases, while liability is incurred when damage is done to property above the grade of the street, the municipality is not ordinarily liable if the damage is done to the premises or the goods therein below grade. But the rule is different where there is a negligent execution of the plan, in which event the municipality is clearly liable. This is covered in the fourth rule laid down, which reads as follows:

“4. There is a municipal liability where *the property of private persons is flooded*, either directly or by water or sewage being set back, when this is the result of the *negligent execution* of the plan adopted for the construction of gutters, drains, culverts, or sewers, or of the *negligent failure* to keep the same in repair and free from obstruction, and this whether the lots are below the grade of the streets or not. The cases support this proposition with great unanimity.”

We would assume that even under the application of the above rule there would be doubt as to the liability of the city if the damage had resulted from the setting back of water by reason of inadequate sewage alone, but there is another element which enters into the consideration of this claim, that is the fact that the city operates the water works system in its private capacity and is therefore bound to the same degree of liability as would exist in the case of any other public service corporation using the streets. In other words, it would be held to a greater degree of care on account of putting a buffalo box in the street than would exist if there had simply been some negligent construction of the sewers. There is nothing to indicate that any sewer was defective, because the downpour of rain was quite extraordinary and would have to be construed as an act of God which no amount of vigilance on the part of the city authorities could foresee. The fact that the cover was off, however, was a condition which could have been ascertained by the city's officers, and the only escape from liability would be in case it could be shown that this was an accident that occurred immediately prior to the rain in question. That is to say, the city having put the hole there, it was bound to see that it was covered unless the cover was removed through no fault of its own within a very short time

before the rainstorm. The firm of Selz, Schwab & Co. was within its rights in occupying the space underneath the sidewalk, since the property is located in the school section where dedications for street purposes are all common law dedications and the owner may use his property in this way. (*Sears v. City of Chicago*, 247 Ill. 204.)

While there may have been extraordinary circumstances which, if discovered, would relieve the city from liability, we are of the opinion that the facts, so far as we have been able to ascertain them, would cause a court to hold that the city was liable.

We return the council files herewith.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Laws Governing Naturalization of Citizens.

January 15, 1921.

HON. WILLIAM HALE THOMPSON, Mayor.

Dear Sir:

I herewith submit to you the laws governing the naturalization of citizens.

Naturalization is the act of adopting a foreigner and clothing him with the privileges of a citizen. (9 Ops. Atty. Gen. 359; *Boyd v. Nebraska*, 143 U. S. 135.)

A naturalized citizen becomes a member of the society possessing all the rights of a native citizen and standing in the future, of the constitution, and the footing of a native.

Chief Justice Marshall in *Spratt v. Spratt*, 1 Pet. 343.

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside.

Fourteenth Amendment to the Const., Sec. 1.

WHO MAY BECOME CITIZENS OF THE UNITED STATES:

No one but free white persons and persons of African nativity and African descent can become citizens of the United States.

WHO CAN NOT BE NATURALIZED AS CITIZENS OF THE UNITED STATES.

No person who opposes and does not believe in organized government; no person who belongs to a society that holds or teaches opposition to organized government; no person who belongs to a society that teaches the duty, necessity or propriety of assaulting or killing any officer or officers of the United States or any other organized government. No person who is a polygamist or believer in polygamy can be naturalized or made a citizen of the United States.

NATURALIZATION IS A JUDICIAL FOUNDATION.

In the United States naturalization is a judicial foundation having been admitted by Congress to the courts. A naturalization proceeding is a judgment.

Chief Justice Marshall in *Spratt v. Spratt*, 4 Peters 393, said:

“The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law and to judge on both law and fact. The judgment is entered on record as the judgment of the court.”

Campbell v. Gordon, 6 Cranch 175.

Mut. Benefit Ins. Co. v. Tisdale, 91 U. S. 238.

That exclusive jurisdiction to naturalize aliens as citizens of the United States is conferred upon the following specified courts:

United States Circuit and District Courts, also all courts of record in any state or territory now existing or which may hereafter be created having a seal, a clerk and jurisdiction in action at law or equity or law and equity in which the amount of controversy is unlimited.

That the naturalization jurisdiction of law courts herein specified, state, territorial and federal, shall extend only to aliens resident within the respective judicial districts of such courts.

That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

He shall declare on oath before the clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is *bona fide* his intention to become a citizen of the United States and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. And such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien, provided, however, that no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration.

Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence, his occupation, and, if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall state the name of his wife, and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date and place of birth and place of residence of each child living at the time of the filing of his petition, provided, that if he has filed his declaration before the passage of this act he shall not be required to sign the petition in his own handwriting.

The petition shall set forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government, a polygamist or believer in the practice of polygamy, and that it is his intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he at the time of filing his petition may be a citizen or subject, and that it is his intention to reside permanently within the United States, and whether or not he has been denied admission as a citizen of the United States, and, if denied, the ground or grounds of such denial, the court or courts in which such decision was rendered, and that the cause for such denial has since been cured or removed, and every fact material to his naturalization and required to be proved upon the final hearing of his application.

The petition shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the state, territory, or the District of Columbia, in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States.

At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Labor, if the petitioner arrives in the United States after the passage of this act, stating the date, place and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the

United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty and particularly by name to the prince, potentate, state or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately proceeding the date of his application he has resided continuously within the United States five years at least, and within the state or territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record.

In case the alien applying to be admitted to citizenship has borne any hereditary title, or has been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application is made, and his renunciation shall be recorded in the court.

When any alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized the widow and minor children of such alien may, by complying with the other provisions of this act, be naturalized without making any declaration of intention.

(Naturalization Laws and Regulations, Sept. 24, 1920.)

Any alien serving in the naval or military service of the United States during the time this country is engaged in the

present war may file his petition for naturalization without making a preliminary declaration of intention and without proof of five years' residence.

An alien over the age of eighteen years may file his declaration of intention immediately upon acquiring a domicile, and at the expiration of five years, he may file application for second papers. An alien over eighteen years of age who has been in the country three years or more may file his declaration of intention, and at the expiration of two years thereafter may file application for second papers. After making application for second papers, it takes about ninety days before issuance of second papers.

First papers cost one dollar (\$1.00); second papers cost four dollars (\$4.00).

A female citizen of the United States loses her citizenship upon marriage to a foreigner. Naturalization of an alien makes his wife and minor children citizens of the United States.

One of the most complete text books on naturalization of citizens is Van Dyne.

Respectfully submitted,
CHARLES W. BIDWILL,
Assistant Corporation Counsel.

Approved:
JAMES W. BREEN,
Acting Corporation Counsel.

Carrying Concealed Weapons in Automobiles.

January 18, 1921.

HON. CHAS. C. FITZMORRIS, Superintendent of Police.

Dear Sir:

In re request today for an opinion as to whether under Section 4 of the Sadler law possession of a revolver in an automobile under the seat is to be construed as carrying concealed weapons.

The request comes to you from the superintendent of police and to him from the commanding officer of the 6th Dis-

trict and to him from Judge LaBuy, apropos the case of Balonick.

Balonick was in his automobile with three persons, driving on the front seat with one of them by his side and the other two on the rear seat, when a revolver belonging to him was found under the rear seat.

The law reads as follows: "It shall be unlawful for any person to carry concealed *upon his person*, any pistol, revolver, or other firearm, without a written license therefor, issued as hereinafter prescribed in this section."

I am of the opinion that the carrying of the revolver in the automobile under the seat as stated is not to be construed as carrying concealed weapons under that law.

Yours very truly,

GILBERT G. OGDEN,
Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,
Acting Corporation Counsel.

Termination of Lease of Wrightwood Playground.

January 20, 1921.

HON. GEORGE F. HARDING, Comptroller.

Dear Sir:

Under date of January 15, 1921, you transmitted to this office two leases, both terminating on April 30, 1915, and a copy of a notice, dated January 15, 1921, from Jessie M. Candy, notifying the City of Chicago to vacate Lots 1 and 2 in the Subdivision of Lots 11 and 12, in Assessors' Division in Block 42 in the Southwest quarter of the Southwest quarter of Section 29, Township 40 North, Range 14 East of the Third Principal Meridian, which property is at present occupied by the city as a playground and a ward yard.

You point out the fact that in 1915 a renewal of the leases could not be obtained and that the Special Park Commission and the Bureau of Streets consented with the lessor on March 10, 1915, to remain in possession of the premises on a month

to month basis, which has been done up to the present time, the city paying the general taxes levied on the premises each year.

We have made an investigation and find that on and after February 15, 1921, the city will be deemed a trespasser on the property and as such can be compelled by court procedure to vacate same ten days subsequent thereto.

On May 1, 1915, the city became a tenant from month to month by virtue of an agreement entered into on March 10, 1915, by the Special Park Commission and the Bureau of Streets with the lessor; on July 12, 1920, the Superior Court of Cook County in Case No. 315816 decreed that the city was a tenant at will, which tenancy can be terminated by a reasonable notice. The notice given to the city in this case is a reasonable notice. The decree is final as to the city because of the fact that on June 22, 1915, the city filed with its appearance an answer to the effect that it was in possession of the property as a tenant under a written lease and that it is ready to vacate said premises at any time it is ordered so to do.

We would suggest, however, that the city allow the case to go to trial and interpose the defense that, although it was decreed to be a tenant at will, it nevertheless was converted into a tenancy from year to year by reason of the annual rent (tax) paid by the city immediately prior to such decree, and, therefore, require a sixty-day notice to be given prior to the expiration of the year.

In 24 Cyc., page 1034, it is stated that an estate at will is converted into a tenancy from year to year by the payment of rent. If a favorable construction be obtained by the court it would, no doubt, hold that the year began on May 1, 1920, and expired on April 30, 1921, and, according to Section 5 of Chapter 80 of Hurd's Revised Statutes, it is necessary that a sixty-day notice in writing be given at any time within four months preceding the last sixty days of the year. In such event, if the proper sixty-day notice be given, the city could remain in possession until April 30, 1921. However, unless a written sixty-day notice be given on or before March 1, 1921, the city would be entitled to remain in possession until

April 30, 1922. If proceedings are brought against the city for possession, we will try to postpone the trial until at least March 2, 1921, or thereafter, so that, in the event a favorable ruling be given by the court it would be too late for the owner of the property in question to give the required sixty-day notice, and, consequently, it would permit the city to remain in possession until April 30, 1922.

We are returning with this opinion the two leases and notice which you forwarded to us in this matter.

Yours very truly,
HARRY T. CHAVERIAT,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Status of Alley.

January 25, 1921.

HON. THOS. H. BYRNE, Superintendent of Streets.

Dear Sir:

Your letter of January 11, 1921, addressed to the corporation counsel, including a sketch of an alley and a strip of land in question, and a copy of the report of Engineer Robinson, has been received.

In answer to your inquiry as to the status, whether public or private, of the strip 2.88 feet wide north of and adjoining the 16-foot public alley north of Chicago avenue and east of Rockwell street, and your authority regarding the objection to the fence erected on part of said strip, we submit the following:

On October 8, 1896, W. T. B. Read caused to be recorded as Document No. 2450610 in Book 70 of Plats, page 49, a plat of his subdivision; on December 10, 1896, the said subdivision was properly vacated under Document No. 2474026; and on July 1, 1898, the property of said Read was again subdivided under Document No. 2706509 in Book 75 of Plats, page 39, as W. T. B. Read's Subdivision of the S. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of the

S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Section 1, Township 39 North, Range 13 East of the 3rd P. M.

The dedication of the streets and alleys in said subsequent subdivision is a statutory dedication, as distinguished from a common law dedication, in that the plat complies in all respects with Chapter 109, Section 3 of Hurd's Revised Statutes. This section of the statute in effect provides that, after a plat is properly acknowledged by the owner, certified by the surveyor and then recorded, it shall be held in fee simple of such portions of the premises platted as are marked or noted on such plat as granted to the public and that it shall be held in the corporate name in trust to and for the uses and purposes set forth or intended.

A dedication, like a contract, consists of an offer and acceptance, and the general rule is that a dedication, whether statutory or common law, is not binding and conclusive on either party until acceptance.

Hewes v. Village of Crete, 175 Ill. 348.

Jordan v. City of Chenoa, 166 Ill. 530.

Hamilton v. Chicago, B. & O. R. Co., 124 Ill. 235.

Schmitz v. Village of Germantown, 31 Ill. App. 284.

City of Edwardsville v. Barsback, 66 Ill. App. 381.

In Chapter 109, Section 2, it is stated:

"The plat having been completed, * * * and * * * recorded * * *, may be used in evidence to the same extent and with like effect, as in case of deeds."

Acceptance of a dedication, as in the case of a deed, may be actual or constructive, express or implied.

Rose v. Elizabethtown, 275 Ill. 167.

There is no doubt as to the acceptance by the city as to the alley along which the strip lies, but the question is: Did the city, in accepting the streets and alleys in the said subdivision also accept the strip noted on the plat as: "Reserved for Sidewalk Space"? The answer is clearly stated in the principle laid down in the case of *Village of Lee v. Harris*, 206 Ill. 428, in which it was said:

"It is insisted that an acceptance of some of the streets and alleys of a plat does not constitute an ac-

ceptance of the whole, and proof of the acceptance of a part is not sufficient to vest the village with right to use, possession and control of all the streets and alleys shown on the plat. We do not so understand the law, but, on the contrary, hold the true rule and doctrine to be, that an acceptance by a city or village of some of the streets and alleys appearing on a plat is an acceptance of the entire system of streets and alleys so appearing, unless the intention to limit the acceptance is shown. In *Village of Augusta v. Tyner*, 197 Ill. 242, at page 246, we said: 'It is true that a street may be accepted in part and the remainder rejected, if it is proved that such was the intention of the public authorities. An acceptance of some of the streets named in a plat will not constitute an acceptance of the whole, if it is shown that there was an intention to limit the acceptance.'

In the subdivision in question there is no evidence of an intention on the part of the city authorities to limit their acceptance to the alleys and streets only, and allow the title to the various strips adjoining therewith, particularly the strip in question reserved for sidewalk space, to remain in the dedicant. Therefore, there is no doubt as to the acceptance by the city of the strip of land in question. The next question to consider is, what did the subdivider intend when he marked on the plat "Reserved for Sidewalk Space." Did he intend it to be used for a private sidewalk for the benefit of the adjoining lot owners, or was it to be a public sidewalk which was to be distinct and separate from the alley part? In our opinion the latter was intended, because the said W. T. B. Read by the execution of the various deeds conveying Lots 18, 30, 65 and 77 along which lots the said strip adjoins, did not in any manner or form convey any right, title or interest in and to the strips to the grantees. It also has been held that the purchaser of a lot in a statutory plat acquires no title to the land of the alley or other land which has been intended for public use, but only to the land within the actual limits of his lots.

Canal Trustees v. Havens, 11 Ill. 554.

There is, however, slight doubt in the word "reserve," and numerous cases have held that the word reserve tends to

negative the idea of a dedication. But after a careful investigation of these cases, wherever the word reserve was used or noted it was for some private purpose, as for example, "Reserved for Wharves," which of course negatives the intention of a public grant. In the case at hand there is not that element that necessarily negatives the intention of the dedicator of the streets, alleys and the adjoining strip to the public, since "Reserved for Sidewalk Space" without any more, does not purport to be for a private purpose, but on the contrary was intended for a sidewalk along and parallel with the alley, all of which was to be used by the public. Furthermore, to corroborate the right by the city in and to the said strip in question, we wish to call your attention to an instrument executed by Harry J. Read, dated December 17, 1907, and recorded on January 15, 1908, as Document No. 4148763 in Book 9400, page 400, which instrument contains the following:

"Whereas it appears by Document 2706509 recorded in Book 75 of Plats, page 39, entitled W. T. B. Read's Subdivision of the * * *, and it appearing that said plat contains certain unnamed and unnumbered strips of land * * *,"

"And Whereas, said unnamed and unnumbered strips of land were *intended* for the use and benefit of the owners of lots in said subdivision as sidewalk spaces and parkways in connection with Read court shown on said plat, and the alley running east and west through said subdivision on said plat for such uses and purposes;"

"And Whereas, W. T. B. Read, who at the time of the execution of said subdivision was the owner of all the property contained in said plat of subdivision, died on or about February 15, 1898, intestate, leaving him surviving Adaline Read, his widow, now deceased, Georgia R. Baker, Allin N. Read, William T. B. Read, Benjamin Read and Harry J. Read (grantor in this instrument), his children, his only heirs at law and next of kin;"

"And Whereas, *doubts* have been expressed as to whether or not said unnamed and unnumbered strips of land above referred to were in fact dedicated by said plat of the subdivision for the use and benefit of the owners of lots in said subdivision."

"Now, Therefore, in consideration of * * *, the said Harry J. Read does hereby dedicate for the use and

benefit of all present and future owners and occupants of lots in Read's Subdivision aforesaid all the following strips of land on said plat of subdivision, to wit: * * *, and also, the strip of land lying south of and adjoining Lots 18, 30, 65 and 77 in said subdivision for sidewalk and alley purposes; to be included in, and to form a part of, the said east and west alley."

On October 16, 1907, a similar instrument, with substantially the same terms, was properly executed by the remaining heirs of said W. T. B. Read, namely, Georgia R. Baker, Allin N. Read, William T. B. Read and Benjamin Read, and said instrument was recorded on January 15, 1908, in Book 9400, page 401, as Document No. 4148764. Whatever doubt or ambiguity there existed by the use of the word "Reserved" on the plat is fully overcome by the aforesaid instruments.

Therefore, we are of the opinion that the said strip 2.88 feet wide as noted above is public property and the fence erected thereon is a trespass in violation of the city's rights.

The sketch and the engineer's report, transmitted with your letter, are returned herewith.

Yours very truly,

HARRY F. CHAVERIAT,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Notice of Election for Aldermen.

January 26, 1921.

HON. JAMES T. IGOE, City Clerk.

Dear Sir:

We are in receipt of your letter of recent date, in which you ask to be advised concerning publication of notice of election for aldermen.

You state in your letter that it has been the practice to issue a notice calling for the election of aldermen in each of the thirty-five wards in the city, in accordance with the provisions of the Cities and Villages Act, and that your question

is asked in view of the recent adoption of the act providing for fifty wards in place of thirty-five.

We assume that your doubt arises because there has not been a redistricting of the city, by reason of which there are only thirty-five wards, as before, while the new law says that the city shall be divided into fifty wards.

This contingency was provided for in the Fifty Ward Act, where it is prescribed that "all elections of aldermen shall be held from the present wards until a redistricting is had as provided for in this act." (Part Five, Sec. 3.) Hence, there are thirty-five aldermen to be elected from the wards as at present constituted for the full term of two years. There may be one or more vacancies, but we are not advised that there has been any special election called to fill vacancies.

There are no provisions of the Fifty Ward Act which alter the method of election or which prescribe a form of notice of election different from that provided for by the Cities and Villages Act. Consequently, there has been no change wrought in this respect, and the form of notice used last year may be followed this year.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
JAMES W. BREEN,
Acting Corporation Counsel.

Extension of Switch Track.

January 26, 1921.

HON. CHAS. R. FRANCIS, Commissioner of Public Works.

Dear Sir:

I am in receipt of your letter of June 24, 1920, asking whether the application for a permit to extend a switch track on the south side of Illinois street to a point 900 feet east of Peshtigo court should be granted, together with the accompanying plat and a copy of the conveyance and dedication to the City of Chicago of two seventy-four foot strips to be used as Grand avenue and Illinois street.

The deed of dedication is properly executed by the Chicago Dock & Canal Company, a corporation of Illinois, to the City of Chicago, and purports to be an unconditional conveyance by the grantor. The instrument contains in part the following:

“(b) Also the South 74 feet of the North 366 feet of the West 900 feet of said Lot 7, said tract extending from the West line of the East 100 feet of said Lot 7 to the East line of Peshtigo court, and to be an extension of East Illinois street; the tract last described (beginning at b.) being subject to the easement, *if any*, of the *Chicago & Northwestern Railway Company* to occupy with its tracks the portion of the South 74 feet of the North 366 feet of the West 900 feet of said Lot 7 now occupied by said tracks, with the right to extend said tracks to the West line of the East 100 feet of said Lot 7,
* * *.”

The ordinance by virtue of which the aforesaid property and other property was acquired contains substantially the same phraseology as provided for in the last mentioned instrument, and, reference is made to Section 6 of an ordinance passed by the City Council of the City of Chicago, at its regular meeting held on Monday, July 28, 1913, which section appears to be published in Council Proceedings on pages 1764 and 1765 for the year 1913.

The only possible claim that can be made by the railway company from the city for a permit for the extension of the switch track in question, is by reason of the following reservation contained in the deed and in the ordinance, to-wit:

“the tract * * * being subject to the easement, *if any*, of the *Chicago & Northwestern Railway Company* to occupy with its tracks the portion of the South 74 feet of the North 366 feet of the West 900 feet, now occupied by said tracks, *with right to extend said tracks to the West line of the East 100 feet* * * *.”

A careful investigation of the records in the recorder's office of Cook County shows that no agreement exists or ever existed between The Chicago Dock & Canal Company and the Chicago & Northwestern Railway Company. Therefore, the City of Chicago had no constructive notice of any right that

may have existed by and between said dock company and railway company. The city, however, had actual notice of railroad tracks on the premises at the time of the purchase of said land in question, and because of such notice, took the land subject to the right that the said railway company might have had.

But due to the ambiguity expressed in the phrase "subject to the easement, if any," it tends to show that the railway company apparently had no established right, but that merely a license existed to use the land for the purposes visible to the city. Had any greater right existed in favor of the railway company, it would undoubtedly have been expressed in the deed of conveyance to the City of Chicago, stating in clear and concise language the nature of the railway company's easement. Even though it be assumed that the railway company had a right by grant of the land from the dock company for railroad track purposes, there is no evidence of the fact that the city knew what this interest was and hence is not bound by any secret agreement.

It is true that a purchaser of land, with notice that his grantor had agreed to give (or has given) a right of way over the same to a railway company, *for a valuable consideration*, takes the premises subject to the rights of such company under its contract with his grantor, and can not maintain ejectment against the company for the land occupied by it rightfully under such contract, but, in the present case it does not appear that such agreement ever existed between the Chicago & Northwestern Railway Co. and The Chicago Dock & Canal Company.

Turpin v. Baltimore, Ohio & Chicago R. R. Co., 105 Ill. 11.

From the facts presented herewith it is our opinion that the Chicago & Northwestern Railway Company had a mere license from the dock company to allow the railway company to maintain its tracks on the property in question, and that the said railway company did not have an easement, or interest in the land. The City of Chicago, purchasing the land for a valuable consideration, had no notice of any agreement

that might have existed between the two companies, and, consequently can terminate the right, whatever that may be, of the railway company by giving them due notice. It might be suggested here, that this department should take the necessary steps to compel the railway company to establish its rights to the occupancy of that part of the street on which its tracks now lie.

In view of the foregoing facts it follows that the Chicago & Northwestern Railway Company is not entitled to a permit under the provision reserved in the deed from the Chicago Dock & Canal Company to the City of Chicago. Your suggestion, that the city should secure some form of agreement, or covenant, allowing the use of part of the tracks now located in Illinois street in connection with the Municipal Pier whenever rail connections are to be made on the pier for freight purposes, may be carried into effect in the event that the City Council should pass an ordinance granting a permit for the switch extension in question and in which permit such provision may be included.

A copy of the conveyance and the plat is enclosed herewith.

Yours very truly,
HARRY F. CHAVERIAT,
Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,
Acting Corporation Counsel.

Right of Special Police Officers to Carry Revolvers.

January 29, 1921.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

We beg leave to acknowledge receipt of your favor of January 27, 1921, in reference to the request of the B. & O. Railroad Company for an opinion on the right of special police officers of the said company to carry revolvers when off the right of way of their railroad.

In reply, we beg leave to advise you that special police officers are appointed in the City of Chicago by virtue of an ordinance of the City Council and, under the terms and provisions of the ordinance authorizing the appointment of special police officers, the power and authority of the said special police officers is limited to the specific location or property that they are appointed to guard. Special police officers of the B. & O. Railroad Company have all the power and authority of regular police officers along and upon the right of way of the B. & O. Railroad Company, and while in the performance of duty along and upon the said right of way they have the right to carry concealed weapons. Their power and authority as special police officers ceases, however, as soon as they are off the right of way of the railroad company, and it naturally follows that they have no authority to carry concealed weapons when off the right of way of their railroad company.

Yours very truly,

JAMES W. BREEN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Meters Used by Private Electric Light Companies.

January 29, 1921.

HON. WILLIAM H. REID, Commissioner of Public Service.

Dear Sir:

We are in receipt of your communication of January 12, 1921, in re an ordinance entitled "Meters used by Private Electric Light Companies: Provision for Testing and Fixing of Fees Therefor."

The question you raise is: "Do meters that are not owned by the seller, but that are leased by the seller and used in the measurement of his commodity come within the jurisdiction of this ordinance even though they are leased from the Commonwealth Edison Company?"

Section 3 of the ordinance in question is as follows:

“DEFINITION OF SELLER AND METER.

“Paragraph 1. The term ‘seller’ when used in this ordinance shall mean and include any corporation, company, association, joint stock company or association, firm, partnership, managing committee, or individual, their lessees, trustees or receivers appointed by any court whatsoever (except, however, such public utilities as may now or hereafter be owned or operated by the municipality), that now or hereafter may own, control, operate or manage within the City of Chicago, directly or indirectly, any plant, equipment, or property, used for or in connection with the production, storage, transmission for sale, delivery or furnishing of electricity, within the City of Chicago, provided, however, that the provisions of this section shall not apply to any public utility company coming under the jurisdiction of and subject to regulation by the Public Utilities Commission having jurisdiction.

“Paragraph 2. The term ‘meter’ when used in this ordinance shall mean and include each and every electrical device that is now or that may hereafter be used for the purpose of measuring the quantity of electricity supplied to any consumer thereof.”

As you will note, this section specifically exempts “sellers” of electricity which come under the regulation of a Public Utilities Commission.

In the case cited by you, however, you state that the electricity is first sold to the owner of the building by the Commonwealth Edison Company and is then resold to his tenants, he renting the meters, which he uses to measure the amount of electricity resold by him to his tenants, from the Commonwealth Edison Company. Such being the case, he (the owner of the building) is the actual “seller” to his tenants, and as such the meters which he employs to measure the electricity so sold come under the jurisdiction of your department, regardless of the fact that the “seller” may be renting said meters from the Commonwealth Edison Company.

In the case of the *City of Chicago v. Bartels*, 146 Ill. App. 180, the Appellate Court said:

“Paragraph 66 of Section 1, Article V of the Cities and Villages Act, gives police power to the city. It is well settled, we think, that under its police power any reasonable legislation by the city is proper regarding the public

health, welfare, safety or morals of its inhabitants. The public welfare and morals of the citizens are involved in giving true weights and measures in the sale of commodities.”

We are therefore of the opinion that the ordinance in question is a valid exercise of the city’s police power, and advise you to proceed and test the meters in question regardless of the fact that they are leased by the “seller” from the Commonwealth Edison Company.

Very truly yours,

WM. W. SMITH,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Liability on Stolen Property.

February 3, 1921.

HON. JOHN A. RICHERT, Chairman Committee on Finance,
City of Chicago.

Dear Sir:

We have your request for an opinion touching the validity of the claim of Joseph Putz, administrator of the estate of Mary Putz, deceased, against the City of Chicago, for \$3,900.00 for loss of jewelry alleged to have been lost through the negligence of the city custodian of the Police Department in the year 1915.

In the first place, we are of the opinion that, so far as the city is concerned, this claim is barred by the Statute of Limitations, more than five years having elapsed since the claim is alleged to have arisen, and no suit having been started against the city in the meantime.

Ill. Rev. Stat., Ch. 83 (Limitations), Sec. 15.

In the statement of claim filed against Cregier in the Municipal Court (a copy of which is attached to your letter), it is stated that on October 4, 1915, a demand was made upon

the custodian for the property, and this would accordingly be the day from which the claim if any, would date.

Hayes v. Mass. L. Ins. Co., 125 Ill. 637.

But aside from this technical defense, the city has the further defense that it is in no event liable for the wrongful or negligent acts of the Police Department.

The custodian of lost and stolen property is an official of the Police Department, appointed by the general superintendent of police.

City Code 1911, Sec. 1923.

Officials of the Police Department, although appointed, controlled and paid by the city, and therefore often spoken of as city officers, are more properly state officers, charged with the enforcement of state laws, and not merely local ordinances. As our Supreme Court has said:

“The heads of the Police Department of Chicago are not mere municipal officers whose functions relate exclusively to that particular municipality, but they are state officers—that is, officers whose duties concern the state at large, or the general public, although exercised within defined territorial limits. The administration of justice, the preservation of the public peace, and the like, although confided to local agencies, are essentially matters of public concern.”

City of Chicago v. Wright, 69 Ill. 318.

Being state officers, the city is not liable for their negligent or wrongful acts.

Johnston v. City of Chicago, 258 Ill. 494.

Culver v. City of Streator, 130 Ill. 238.

Craig v. City of Charleston, 180 Ill. 154.

City of Chicago v. Williams, 182 Ill. 135.

Tollefson v. City of Ottawa, 228 Ill. 134.

Evans v. City of Kankakee, 231 Ill. 223.

In *Johnston v. City of Chicago*, 258 Ill. 494, the Supreme Court, in discussing what officers a city may be liable for, and what officers it is not liable for, said:

“Neither is a city liable for the acts of its employes who are acting under the police power granted to such corporation.”

And in *Culver v. City of Streator*, 130 Ill. 238, this rule, with the reasons for the same, is more fully expressed as follows:

“Police officers appointed by the city are not its agents or servants so as to render it responsible for their unlawful or negligent acts in the discharge of their duties. Accordingly it has been held that a city is not liable for an assault and battery committed by its police officers, though done in an attempt to enforce an ordinance of the city. *Butterick v. City of Lowell*, 1 Allen 172. Nor for illegal and oppressive acts of officers committed in the administration of an ordinance * * *

“The ground upon which the foregoing cases, and many others of like nature, are admitted as exceptions to the general rule of corporate liability is, that in those matters the city acts only as agent of the state, in the discharge of duties imposed by law for the promotion and preservation of the public and general welfare, as contradistinguished from mere corporate acts, having relation to the management of its corporate or private concerns, and from which it derives some special or immediate advantage or emolument in its corporate or private character. The police regulations of a city are not made or enforced in the interest of the city in its corporate capacity, but in the interest of the public. A city, therefore, is not liable for the acts of its agents in attempting to enforce such regulations.”

Culver v. City of Streator, 130 Ill. 238.

- Applying this principle, our Supreme Court has gone to the extent of holding that it is no part of the duty of the corporation counsel to defend suits brought against policemen for false arrest.

City of Chicago v. Williams, 182 Ill. 135.

It is evident that the office of custodian of lost and stolen property was not established for the benefit of the city, as a corporation, but the convenience and protection of the public, under the *police power*, which the state has not merely granted the city as a favor, but “thrust” upon it as a duty. (*Johnston v. City of Chicago*, 258 Ill. 494.) It therefore follows that the city would not be liable for any negligence on the part

of the city custodian—if he was negligent, which, however, we have no reason to believe that he was.

As to whether the estate of De Witt C. Cregier would be liable in this matter—a question now in controversy in a suit pending in the Municipal Court—your committee, we take it, is not now interested. The same is probably true of any proposed suit against the bondsmen of Cregier. We assume, however, that if any suit should now be brought against the bondsmen, they would plead the Statute of Limitations.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Residence Qualifications of City Engineer.

February 14, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

We are in receipt of your letter dated February 8th, wherein you set forth certain facts relative to a recent examination for the position entitled "City Engineer," and ask for our legal opinion as to whether one Alexander Murdoch was eligible to take such examination.

It appears that such examination for said position of city engineer was held by the Civil Service Commission on January 25, 1921; that all applicants for such examination are required to comply with the provisions of Section 3, Rule 2 of the Civil Service Rules then in force and effect, which read as follows:

"Residence. No person shall be admitted to any examination who is not at the time of said examination an actual bona fide resident of the City of Chicago."

It further appears that Mr. Murdoch had resided in Philadelphia, Pennsylvania, since 1918, and until shortly preceding said examination; that on January 24, 1921, Mr. Mur-

doch filed with the Civil Service Commission a written application to be admitted to take such examination, which application was subscribed and sworn to by Mr. Murdoch on said latter date.

It further appears that the following questions are set forth in said application and the following answers made thereto by Mr. Murdoch, *i. e.*:

(Question) "What is your actual residence?" (Answer) "State of Illinois, City of Chicago, Street and No. 9435 Burnside."

(Question) "How long have you been a legal resident of Chicago?" (Answer) From 1/19, 1921, to present."

(Question) "What is your present place of abode?" (Answer) "9435 Burnside Avenue, Chicago."

You will note that the foregoing answers are declarations made under oath by Mr. Murdoch, from which it is obviously apparent that his residence and place of abode is situated at 9435 Burnside avenue in the City of Chicago, and that he not only considers and declares himself to be an actual resident of the City of Chicago, but also a legal resident of said city.

In determining the meaning of the phrase "actual bona fide resident," we find in Century Dictionary, the following definitions of the word "actual," *i. e.*, "in full existence; real; denoting that which not merely can be, but is; now existing; present."

We can see no reason to doubt that at the time such examination was held that Mr. Murdoch was physically present in person in the City of Chicago, and that since January 19, 1921, and up to the time said examination was held, that he had acquired an existing, present and fixed residence or abode in Chicago. Therefore, we must conclude that at the time said examination was held, Mr. Murdoch had acquired an actual place of residence or abode in the City of Chicago.

The term "bona fide" has a well known legal meaning, *i. e.*, in good faith, without fraud or deception. There is nothing to show that Mr. Murdoch had acquired such residence for

any purpose not in good faith, or for the purpose of practicing any fraud or deception. In fact his specific and frank declaration with respect to his residence made under oath, would controvert any presumption of bad faith or deception in this instance. Further than that, we are inclined to believe that the meaning of the term "bona fide," as used in this instance, is somewhat synonymous with the meaning of the word "actual," that is to say a resident who is physically present and in person and in fact resides at his place of residence, as distinguished from a constructive resident. Therefore, we must conclude that if Mr. Murdoch is an actual resident of Chicago, he is likewise an "actual bona fide resident" thereof.

A proper rule of the Civil Service Commission has the same force and effect as if it were enacted by the Legislature, and while we are not prepared to state that the foregoing provisions should be construed strictly in accordance with the construction placed upon like language when used in a statute law, we have deemed it advisable to follow the interpretation which the courts have applied to like language when used in the statutes.

In the case of *United States v. Penelope* (U. S.), 27 Fed. Cas. 486, 487, the word "resident" is defined as "dwelling or having an abode in any place."

In *Words and Phrases*, Vol. 7, and the cases therein cited, we find the following definitions of the word "resident," i. e., "one who dwells, abides, or lives in a place;" "having abode in any place;" "living;" "one who has a residence."

The question of whether a person is a resident of a place is largely a matter of intention, as shown by the declarations and acts of such person.

Actual residence is determined by intention and acts.

Town of Dorr v. Town of Seneca, 74 Ill. 101, 105.

The declarations of a person relative to changing his actual residence or domicile, are admissible to show his intention.

Matzenbaugh v. The People, 194 Ill. 112.

People v. Kirkpatrick, 164 Ill. App. 328.

A person's declaration as to his domicile, though not nec-

essarily conclusive, will determine the question in the absence of more convincing proof to the contrary.

Wilbarding v. Miller, 106 N. E. 665.

88 Ohio St. 609, 90 Ohio St. 28.

The question whether one is an "actual bona fide resident" of a place depends on the intention of the party as determined from his expressions, conduct and testimony.

Canfield v. Cravens, 138 La. 283.

Where a party is already abiding at a particular place while his domicile is elsewhere, and while so abiding he forms an intention to make it his home permanently, or for an indefinite period, and continues to abide there pursuant to such purpose, he thereby acquires a new domicile.

Pendleton v. Commonwealth, 110 Va. 229.

"Where a party leaves his residence, or *acquires a new one*, it is the intention with which he does so that is to control. Hence the *shortest absence*, if at the time intended as a permanent abandonment, is sufficient, although the party may soon afterwards change his intention."

"A man may acquire a domicile if he be personally present in a place and elect that as his home, even if he never design to remain there always, but design at the end of some short time to remove and acquire another."

Kreitz v. Behrensmeyer, 125 Ill. 141, 193, 195.

Welsh v. Shumway, 232 Ill. 54, 78.

To acquire a domicile, both the fact and intent must concur, and actual residence and the intention to remain, either personally or for an indefinite time, without any fixed or certain purpose to return to the former place of abode, are required; *but the length of residence is immaterial, provided the other elements are present.*

Winans v. Winans, 205 Mass. 388.

A man may acquire a domicile or residence if he be personally present in a place and elect that as his home.

Behrensmeyer v. Kreitz, 135 Ill. 591, 635.

That a person who changed his domicile allowed his family to remain temporarily in his former home until he could

remove them to his new home does not render his change of domicile incomplete.

Emery v. Emery, 218 Mass. 227, 105 N. E. 879.

A resident of a place is one whose place of abode is there, and who has no present intention of moving therefrom.

Scholl v. Schenck, 40 Ind. App. 581.

A new domicile, one acquired by actual residence, will be presumed to continue.

Moffett v. Hill, 131 Ill. 239, 244.

In the absence of any such legal requirement, one is not required to show residence for any particular time.

Union County Inv. Co. v. Messix, 152 Iowa 412.

A person may be a legal resident of one place and an actual resident of another, but his actual residence must be substantial, that is to say, his abiding place.

Ludlow v. Szold, 90 Iowa 175.

Tipton v. Tipton, 87 Ky. 243.

A man's residence is his home or habitation, where that residence is fixed and at a particular place, and he does not entertain a present intention of removing therefrom.

Stevens v. Larwill, 110 Mo. App. 140.

Johnson v. Smith, 43 Mo. 499.

"Actual residence" is not always the legal residence or inhabitancy of a man.

When a man buys or rents a house and sets up house-keeping with his family with the design of remaining there until he has completed certain work, he becomes an actual resident there, although his domicile is in another county, to which he intends to return upon the completion of the job.

In re Brannock, 131 Fed. 819, 822.

The term "actual bona fide resident" means a person who has an abode at which he actually lives.

State v. Joyce, 123 La. 633.

In view of the foregoing it is clearly apparent that where a person acquires an abode in a particular place and while

actually abiding at such place, elects to make it his home with no present intention of moving herefrom, such person, in the absence of convincing proof to the contrary, is an actual resident of such place for all purposes; and in the absence of some further specific legal requirements, also a legal resident thereof.

It appears that on January 24, 1921, one day preceding the date of said examination, Mr. Murdock was personally present in Chicago; that on said date he filed with the Civil Service Commission a written application to be admitted to take said examination, wherein he states under oath that he has acquired an actual residence and place of abode in Chicago, and that he has been a legal resident of Chicago from January 19, 1921, up to the time of filing said application. Such declarations under oath must be given great weight. They not only show an intention to change his place of residence from Philadelphia to Chicago, but likewise that at the time of said examination and prior thereto, he had elected to make Chicago his abode or home with no present intention of moving therefrom. The mere fact that the period of his actual residence in Chicago is of short duration, would not defeat such declared intention and election. He could have formed such intention and made such election at any time up to the time of said examination. Therefore, we are of the opinion that at the time of said examination Mr. Murdoch was an actual bona fide resident of the City of Chicago, within the meaning of said provisions of the Civil Service Rules pertaining to the residence of applicants for examination, and, therefore, with respect to the foregoing qualification, eligible to take said examination for the position of city engineer.

Yours very truly,

H. C. FOSTER,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Patent Claims of Former City Employees.

February 16, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

We acknowledge receipt of your communication to this department, dated February 7, 1921, requesting to be advised in re patent claims of a hydrant by David D. Goldberg, a former city employe. Also a communication addressed to you from said Goldberg, dated February 1, 1921, and one from H. L. Lucas, supt. water extension for the City of Chicago, dated January 5, 1921. In reference to your above request, we beg to advise as follows:

It appears that the said Goldberg is the owner of a patent device on a hydrant, and that the particular apparatus which he has patented, has been in use by the City of Chicago, according to Mr. Goldberg, for the past four years, and according to Mr. H. L. Lucas, superintendent of water pipe extension for the city for two years last past.

It also appears that the said Goldberg was in the employ of the City of Chicago, during the year 1915, as a mechanical designing engineer, in the Designing Division. As such, together with several other city employes, he was selected to assist one W. R. Brown in the designing of a new hydrant for the city. It appears moreover, that after several months of work, the present design of hydrant, which is now in use by the city, was perfected and put into operation. It will be noted that the above experimentation in which Goldberg was engaged as an employe of the City of Chicago, was in the year 1915. It will also be noted that although the patent in question was issued on August 10, 1920, the application therefor was made by Goldberg on December 20, 1915,—at the very end of that year.

It will also be noted that although the City of Chicago has been using the device in controversy for the past four years according to Goldberg's own statement, nevertheless no claim of any sort, or protest against said use, has been made until the present one. In this connection it is also important

to remember that since Goldberg was employed in reference to the original installation of this device, he undoubtedly had notice from the very beginning of its use by the city.

Goldberg now informs the city of the issuance of his patent, and of the use thereof by the City of Chicago, and states his willingness for the city to continue said use provided it legally and formally renounces any right, title, or interest in and to said patent.

The law is that where an employe is hired to do certain work by his employer, and while in the course and scope of such employment, invents a device, the employer has an implied right to the use of such device, notwithstanding that the employe may subsequently patent same.

To this effect are the following cases:

Whiting v. Graves, 3 Bam. & A. 222.

Solomons v. United States, 137 U. S. 342.

L. & B. Company v. Locke, 150 U. S. 1913.

Gill v. United States, 160 U. S. 426.

American Tube Works v. Bridgewater Iron Co., 26 Fed. Rep. 334.

Pressed Steel Car Co. v. Hansen, 128 Fed. Rep. 444.

Barber v. National Carbon Co., 129 Fed. Rep. 370,
and

Schmidt v. Central Foundry Co. et al., 218 Fed. Rep. 466.

In *Solomons v. U. S.*, *supra*, the court said:

“When a person in the employ of another in a certain line of work devises an improved method or instrument for doing that work, and uses the property of his employer and the services of other employes to develop and put in practicable form, his invention, and explicitly assents to the use by his employer of such invention, a jury, or a court trying the facts, is warranted in finding that he has so far recognized the obligations of service flowing from his employment and the benefits resulting from his use of the property, and the assistance of the employes, of his employer, as to have given to such employer an irrevocable license to use such invention.”

In the Goldberg case the city has been using the invented device since 1915, and the patent thereon was not obtained

until 1920. Goldberg in his letter to the city admits he was cognizant of the use by the city of the device in question for the past four years. It would, therefore, seem he is equitably estopped from protesting against such further use; in other words, there has been an implied consent, which brings the present case within the decisions mentioned above.

It is the suggestion of the undersigned, that, since the city is not in the business of exploiting patents, an agreement be entered into, by and between the said Goldberg and the City of Chicago, whereby and wherein the city disclaims any right, title or interest in and to the patent on the controverted device, and whereby and wherein the said Goldberg grant to the said city the perpetual right and perpetual license to the use of said patented device.

Such an instrument would merely state the rights of the parties as they actually are in law.

Yours very truly,

EMANUEL ELLER,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Payment of Committee Expenses Out of Traction Fund.

February 18, 1921.

HON. JOHN TOMAN, Chairman Sub-Committee of Committee on Local Transportation.

Dear Sir:

This opinion is in reply to your request dated February 11, 1921. You ask whether an appropriation may lawfully be made, payable out of the traction fund, to defray the expense of an investigation to be made by your sub-committee. Such investigation is to be made of the street railway systems in different cities in the United States for the purpose of acquiring information and views for the guidance of the City Council and other city officials with respect to the use to be made of the traction fund in the interest of the people.

In the contract-ordinances between the city and the street railway companies, it is provided with respect to the use of the traction fund as follows:

“CITY TO ESTABLISH SINKING FUND FOR MUNICIPAL PURCHASE.

“It is further provided that, subject to the action of the City Council of said city, the said city shall deposit the amount so paid to the said city to the credit of a separate fund to be kept and used for the purchase and construction of street railways by said city; but any failure to comply with this provision shall in no way affect the rights or obligations of the company under this ordinance.”

For reasons which it is unnecessary here to specify, we think that the street railway companies now have no interest in the traction fund and have nothing to say as to how it shall be used. But under the provisions of the contract-ordinances above quoted we are of the opinion that the City Council may lawfully authorize such fund to be used only for the purpose specified in the contract-ordinances, viz.: “for the purchase and construction of street railways by said city;” and for purposes incidental thereto.

The Mueller law (Hurd’s Statutes, 1917, pp. 534, 535), provides:

“That every city of this state shall have the power to own, construct, acquire, purchase, maintain and operate street railways within its corporate limits, and to lease the same or any of the same to any company incorporated under the laws of this state for the purpose of operating street railways for any period not longer than twenty years on such terms and conditions as the City Council shall deem for the best interests of the public.”

In *Barsaloux v. City of Chicago*, 245 Ill. 598, the Supreme Court upheld an appropriation as follows (245 Ill. 600):

“ ‘For conducting an investigation into and securing a report of expert engineers and others as to the desirability of constructing subways under and in accordance with the provisions of the ordinances of the City of Chicago passed February 11, 1907, and entitled “An ordinance authorizing the Chicago City Railway Company

to construct, maintain and operate a system of street railways in streets and public ways of the City of Chicago," and "An ordinance authorizing the Chicago Railways Company to construct, maintain and operate a system of street railways in streets and public ways of the City of Chicago," and as to the location, character, construction and use of said subways, and for preparing plans therefor, \$50,000, said amount to be paid out of the moneys paid to the City of Chicago by said above named companies in pursuance of said ordinances of February 11, 1907.' "

The court, in the Barsaloux case, said (p. 612):

"There is, in our opinion, no valid objection to using the traction fund, or any other available corporate funds, for the purpose of acquiring or constructing subways in the streets of the city."

The court held that the traction fund could be used for the purpose of acquiring or constructing subways, because that would be within the power to acquire or construct street railways. Thus, the court, on pages 608 and 609, said:

"The reasoning of the New York court in the case above quoted from is applicable to the case at bar. It is not at all improbable that in a great city like Chicago, in order to have a complete system of street railways, it will become necessary to construct street railways upon, above and below the surface of the streets. The Mueller law, as well as the traction ordinances, contemplates the acquisition of street railways by purchase or construction. It would be unreasonable to hold that the city could purchase such part of a street railways system as was built upon the surface of the streets, but could not acquire such portions, if any, of the system as were below the surface of the streets. So far as the power of the city to acquire or construct street railways is concerned, in our opinion there is no difference between surface street railways and those constructed beneath the streets."

The court further said on page 612:

"The appropriations made by the city are not for the purpose of purchasing or constructing subways, but only for the purpose of doing necessary preliminary work which will enable the city to determine whether it is advisable to proceed with the construction of such subways under the existing ordinances of the city. * * * THE

POWER TO CONSTRUCT NECESSARILY INCLUDES THE POWER TO TAKE THE PRELIMINARY STEPS CONTEMPLATED BY THE APPROPRIATION ORDINANCE IN QUESTION.''

As we understand from your request for our opinion, the purpose of your proposed investigation is to aid the City Council in determining how the traction fund shall be used for the purchase or construction of street railways by the city. This appears to us to be an important and urgent matter; since it will doubtless be to the interest of the people for the city to acquire or construct, with the traction fund, as much street railways, including subways, as possible, in the near future, so as to be in a position to sell or lease the same to the transportation district contemplated by the mayor's plan of people's ownership and operation at a permanent five-cent fare, when the same is organized and in operation.

Therefore, we are of the opinion that the expenses of your proposed investigation may properly be paid out of the traction fund.

Yours respectfully,

CHESTER E. CLEVELAND,

Special Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Riparian Rights on North Shore.

February 23, 1921.

HON. CHAS. R. FRANCIS, Commissioner of Public Works.

Dear Sir:

In response to your verbal request for an opinion as to the riparian rights of the City of Chicago in the event that it purchase the property bounded on the east by Lake Michigan, on the north by Kenilworth avenue, on the west by Sheridan road, and on the south by Greenleaf avenue, which property is further described as Blocks 11 and 12 in the Circuit Court Partition, being a subdivision of the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and the N. E. fractional $\frac{1}{4}$ of Sec. 32, Township 41, Range 14 East of the 3rd P. M., I submit the following:

The plat of survey made by Samuel S. Greeley, recorded on June 27, 1881, as Document 334887 in Book 16 of Plats, page 11, shows that the riparian rights were not segregated from the fee in Blocks 11 and 12. Whether or not the riparian rights were severed since the recording of the above plat can not be definitely ascertained without an abstract showing what took place since that time, but from a careful investigation of the tract book containing the aforesaid described property, I am of the opinion that they have not been severed and are still with the party in whom the fee is vested. Therefore, if the city would purchase the said land in question it would obtain the riparian rights along same.

The next question to consider is whether the city would acquire the land made to the lands in question by reason of natural accretions. The answer thereto depends upon the circumstances relating to the said lands. An owner of lands abutting on Lake Michigan is entitled to whatever additions are made to his lands by reason of natural accretions imperceptibly made at any moment of time, but such owner has no right to build piers into the lake for the purpose of making land or increasing the boundary of his premises nor has he the right to do any act which will produce that result. Lands covered by the waters of the lake belong to the state and a riparian owner has no right, by any device, whatever, to extend his boundary line beyond the water's edge and any act which produces such a result inflicts an injury on the rights of the state and may be inquired into and abated.

Revell v. The People, 177 Ill. 468, 483.

Accretions formed by artificial means such as filling in or building out land or by wrongful obstructions in the waters of the lake which cause the action of the winds and waves to from additions to riparian lands, do not belong to the riparian owner, but are the property of the state. Any structure placed upon the land of the state below or beyond the water's edge in the water of the lake is a purpresture and may be abated.

Revell v. The People, 177 Ill. 468, 489.

Sage v. Mayor of City of New York, 154 N. Y. 69.

The possession and enjoyment of lands made by artificial means for a long period of time does not warrant the presumption of a grant, and a mere permissive use can not be the basis of a claim of an adverse interest. Even the city's right of access to the water's edge along Kenilworth avenue, Estes avenue and Greenleaf avenue is subject to the rights of the State of Illinois by reason of the wrongful reclamation, if any, of the submerged lands of the state.

In the event the city purchase the lands in question, reference is made to Section 709 of Chapter 24, and Section 127 of Chapter 105, of Hurd's Revised Statutes.

Therefore, unless one or more of the foregoing circumstances exist along the lake front of the lands in question, the city, in the event it purchased said lands, would obtain same with the riparian rights thereto.

Yours very truly,

HARRY F. CHAVERIAT,
Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,
Acting Corporation Counsel.

Appropriation Bill for Water Fund, Etc.

February 28, 1921.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

We have before us your request for an opinion as to whether the appropriations from the water fund, vehicle tax fund, bond funds, school funds, library fund, Municipal Tuberculosis Sanitarium fund, pension funds, etc., could lawfully be made prior to the passage of the annual appropriation bill.

If this called for a categorical answer, we would be obliged to say that this can be done legally. But we apprehend that you want to be advised concerning the effect it would have on the balance of the appropriations to be made, as well as whether the appropriations so made would be lawful.

The provision of House Bill No. 59 (now pending in the senate and probably soon to be a law) which relates to this matter reads as follows:

*“And, provided, further, that in the year 1921, in cities and villages having a population of one hundred thousand or more, the city council or board of trustees, as the case may be, may, at any time within the first half of the fiscal year, pass its annual appropriation bill, or it may, at any time within the first half of the fiscal year after the passage of the annual appropriation bill, pass additional or supplemental appropriation ordinances adding appropriations to the annual appropriation bill by making appropriations which may relate back to the commencement of said fiscal year, thereby amending the said annual appropriation bill. * * *”*

It will be seen from the above that it was intended that the regular appropriation bill should be passed first, and that the same may be supplemented after it is passed by additional appropriations relating back to the first of the year.

Two years ago there were three appropriation ordinances passed on April 2nd, while the annual appropriation bill was passed June 30th. The question arose whether this proceeding was correct, and whether it was not likely that the first appropriations would be invalidated because they were supplemental appropriations passed before instead of after the passage of the annual appropriation bill. To overcome this objection we repeated the appropriations in the annual appropriation bill when that was passed. There still remained the possibility of an attack on the theory that the first appropriation bill might have been construed as the annual appropriation bill. We did not regard this as a dangerous point, and we believe we would have been prepared to meet it successfully. Nevertheless, we would not advise the passage of similar ordinances this year, because there is no occasion to make an opening of this kind for objectors. The result to be accomplished can be attained as well by authorizing expenditures prior to the passage of the annual appropriation bill which can be duly appropriated for when that is passed.

Incidentally, we call attention to the fact that two years ago the City Council followed up the passage of the three

ordinances above referred to by the passage of a tax levy ordinance containing levies for the amounts so appropriated. We advised the mayor that this procedure was fraught with great danger, because under the law we are entitled to only one tax levy ordinance outside of levies for bonds which are voted on by the people. The mayor thereupon vetoed that tax levy ordinance.

It is not too late to have the bill pending before the Legislature amended, if you come to the conclusion that it would be advisable to change it so that preliminary appropriations can be made that can be added to the subsequent appropriations. It would probably delay the passage of the bill a week if that is done. It will be necessary to advise us on this point immediately if such a change is to be made.

We do not recommend the change of the bill, because such a provision as outlined might be construed as taking away the power of the City Council, which it now has, of authorizing expenditures before any appropriation bill is passed. Of course, the law could be amended so as to cover this last point, but then you would have the whole subject of authorizing expenditures without an appropriation wide open, and this might result in serious embarrassment in the future financing of the city.

We have thrown out the above suggestions although you have not specifically requested light on the points covered, believing that they may be helpful to you in determining your course.

Yours very truly,

LEON HORNSTEIN,

Approved: *Assistant Corporation Counsel.*

JAMES W. BREEN,

Acting Corporation Counsel.

Amendments of Weights and Measures Ordinance.

March 1, 1921.

HON. MORRIS ELLER, Inspector of Weights and Measures:

Dear Sir:

We have examined the two proposed amendments to the

present weights and measures ordinances, as well as the proposed new ordinance submitted by you, and find the amendments to be in proper form. The proposed new ordinance, however, confers such broad and arbitrary power upon the inspector of weights and measures, and his deputies, that we fear the courts would hold it to be unconstitutional, as violating the provision against unreasonable searches and seizures.

Section 6, of Article II, of our State Constitution reads:

“The right of the people to be secure, in their persons, houses, papers and effects, against *unreasonable searches and seizures* shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the person or things to be seized.”

It is true that under its police power, the state or municipality can go very far in providing for reasonable inspection of businesses and premises, but they are distinctly limited to what is *reasonable*. Any regulations that go beyond that, are in violation of the Constitution. This is elementary. The difficulty is, of course, to determine what is reasonable under given circumstances.

The proposed ordinance, as we understand it, vests in the inspector of weights and measures, the authority to enter “any place, building or premises,” “without formal warrant” or stop any person on the street, or elsewhere, and force him to go along with him “to *some place* which the inspector of weights and measures, or any of his deputies, may specify,” in order to enable the inspector to “weigh, measure and inspect packages or amounts of *commodities of whatsoever kind*,” in order to determine not only whether they (in case they are being offered for sale) are of the weight and measure they purport to be, but also to determine generally “*whether they be offered for sale or sold in a manner according to law*.” The inspector and his deputies are also given broad power to *arrest without warrant* and to *seize, without warrant*, any “package exposed for sale *in violation of law*.”

It appears to us that this ordinance is broad enough to authorize the inspector of weights and measures, and his dep-

uties, to do anything from the enforcement of the Prohibition Laws to the searching for stolen goods, or the ferreting out of violations of the Pure Food Act. That such broad powers are necessary to the discharge of the duties properly belonging to the office of inspector of weights and measures will hardly be contended, and being unnecessary, the courts are very likely to hold that they render the ordinance unreasonable and void.

Moreover, the unlimited and arbitrary power which the ordinance confers upon the inspector and his deputies to "weigh, measure and inspect packages or amounts of commodities of whatsoever kind," would, in our opinion, render the ordinance unconstitutional, since such power does not purport to be limited to purposes connected with *weights and measures*. The same may be said of the authority to go upon any or any part of a person's premises, whether any commodities are weighed and measured there or any weights and measures kept there, or not.

But a still more serious objection to the constitutionality of the ordinance is, that it confers upon the inspector and his deputies the power to *arrest without a warrant* and to *seize without a warrant* any packages or commodities which, in their judgment, are being sold "in violation of law." If the ordinance merely said that the inspector and his deputies shall have *the same* power of arrest and seizure as police officers have, we would know of no constitutional objection to it. But, as it now reads, it confers greater power upon the inspector in that regard than any other officer now has. The power to arrest without a warrant and to seize goods and commodities without a search warrant are extraordinary powers, which are easily liable to be abused, and which the law will not therefore, permit to be used, except in *extreme emergencies*. (*Boyd v. U. S.*, 116 U. S. 616.) Under the old common law, it was permissible only in case of a *felony* or a *breach of the peace*. (Freund on Police Power, Sec. 87.)

Our statute is a little broader than that, for it reads:

"An arrest may be made by an officer or by a private person without warrant, for a criminal offense committed or attempted to be committed *in his presence*,

and by an officer, when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it." Illinois Crim. Code, Sec. 342.

Under this statute it has been held that if an officer should make an arrest without a warrant and it should afterwards turn out that no crime had in fact been committed (either by the person arrested or by anybody else), even though the officer had reasonable grounds for believing that such crime has been committed, he will be held personally liable, in damages, for false arrest.

Wood v. Olson, 117 Ill. App. 128.

Enright v. Gibson, 219 Ill. 550.

It will thus be seen that even a police officer can not safely arrest anybody without a warrant unless the crime is being committed at the time and *in his presence*. In all other cases, he is taking the risk of exposing himself to a damage suit.

Bishop in his work on Criminal Procedure says (Sec. 167):

"A private person, or even an officer can not without a warrant, arrest one for a *misdemeanor* committed on an occasion already passed."

And again, in speaking of sheriffs and police officers, he says (Sec. 181):

"For past offense below felony, none of these officers can arrest without a warrant; unless, for example, it is an assault liable to end in a felony by the death of the injured person."

In view of these principles, we believe that the provisions of the proposed ordinance, allowing the inspector and his deputies to arrest without a warrant, would not protect them from personal liability in case it should afterwards be established that the act charged against them was not criminal. The same applies to the power to seize commodities without a warrant.

If you desire us to re-draft the ordinance to conform with the views herein expressed, we shall be pleased to do so. In view, however of the fact that the Constitution permits

only *reasonable* search and seizure and in view of the further fact that there will always be differences of opinion as to when the limits of reasonableness have been reached, we do not flatter ourselves on being able to draft an ordinance that will forestall all argument on that question.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Damages for Leak in Fire Hydrant.

March 2, 1921.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Replying to your request for an opinion as to the liability of the city with reference to a certain claim of owner of the property at 707 W. 46th place for damages arising out of a leak in the hydrant at 46th place and Union avenue on March 1, 1920, will state that I have made an investigation in the matter and find the facts to be as follows:

On March 1, 1920, there was a break in the hydrant at 46th place and Union avenue. On notice being received steps were immediately taken by the Water Pipe Extension Bureau to shut down the valves controlling this section of the main and the catch basins opened to let the water escape.

A municipality is bound to exercise due care and skill in constructing and maintaining water mains and hydrants for the distribution of water, but they are not insurers of the safe condition of property, and consequently are not liable for damages that could not have been prevented by the exercise of due care and caution.

In the case of *Selz, Schwab & Co. v. City of Chicago*, 202 Ill. 549, the court said:

“There were no facts stated from which the law would imply a duty of inspecting the pipes laid deep in the earth below the streets, or any facts showing for

what reason an inspection would or could be necessary. Judging from the facts stated in the count, an inspection of mains and pipes under the streets would be impossible, and if there were any facts showing the necessity or propriety of such an inspection they should have been alleged."

As there was no negligence on the part of the city or its employees in the original construction of the hydrant, nor was there any negligence on its part either in its maintenance in making repairs or otherwise, I am of the opinion that the city is not liable.

Yours very truly,
THADDEUS F. KUFLEWSKI,
Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,
Acting Corporation Counsel.

Proposed New Electrical Ordinance.

March 7, 1921.

HON. WILLIAM G. KEITH, Commissioner of Gas and Electricity.

Dear Sir:

We have examined the draft, submitted by you, of a proposed ordinance entitled, "*An Ordinance to Regulate the Sale, Installation and use of Electrical Devices*," and find the same to be proper in form, if otherwise valid.

In considering the validity of an ordinance of this character, it must be borne in mind that the Cities and Villages Act nowhere expressly grants the city the power to license and regulate the sale and use of electrical devices. And our Supreme Court says:

"The authority of the City Council to pass any ordinance must be found in some act of the Legislature. Such authority is always strictly construed, and any reasonable doubt of its existence must be resolved against the right of the municipality to exercise it."

City of Chicago v. Mandel Bros., 264 Ill. 206.

Inasmuch, however, as electrical devices are apparatus used in and about buildings (which the city has express power to regulate), and considering that such devices, when used for the transmission of light, heat and power, are liable to cause considerable risk of fire, we are of the opinion that the proposed ordinance is properly an ordinance for the prevention of dangers from fires, and as such comes within the powers granted in Clauses 63 to 66 of Section 1 of Article V of the Cities and Villages Act, which gives the city power:

“To prevent the dangerous construction and condition of chimneys, fireplaces, hearths, stoves, stove-pipes, ovens, boilers, *and apparatus used in and about any building and manufactory*, and to cause the same to be removed or placed in a safe condition, when considered dangerous; to regulate and prevent the carrying on of manufactories dangerous in causing and prompting [promoting] fires; to prevent the deposit of ashes in unsafe places, and to cause all such buildings and enclosures as may be in a dangerous state to be put in a safe condition.”

There can hardly be any question that electrical devices of the kind specified in the proposed ordinance are apparatuses used in and about buildings. Nor can there be any question that they sometimes are dangerous from the standpoint of fires (quite as much so as chimneys, stoves or boilers) and that it therefore is desirable that they be regulated.

In construing Clause 63, above mentioned, our Supreme Court said:

“This clause deals with the construction and condition of buildings *and the apparatus used in and about them*. * * * This clause is designed to prevent conditions that are liable to cause fires.”

City of Chicago v. Pettibone & Co., 267 Ill. 573.

Furthermore, where public health and safety are involved the courts are inclined to construe the police powers of a city very liberally.

In *City of Chicago v. Drogasawacz*, 256 Ill. 34, an ordinance requiring all persons operating bakeries to take out a license was upheld under Clauses 50 and 53 of Section 1 of Article V of the Cities and Villages Act, which authorize the city

“to regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, *and all other provisions.*”

The court said:

“Manifestly the phrase ‘other provisions,’ in these two sections, in the connection used, includes the bakery products covered by the ordinance here in question, such products being articles of the same character as those specifically enumerated.”

The court also added that although the word “license” was not used in the above sections, it was to be implied from the power to “regulate.”

In *City of Chicago v. Mandel Bros.*, *supra*, our Supreme Court, in considering the validity of an ordinance forbidding the retail sale of goods on a floor more than 20 feet below the street grade, said:

“The Legislature has conferred upon City Councils power to regulate the construction and use of private buildings, to guard against the calamities of fire, and to provide protection against dangerous conditions in respect to fires. The provisions containing such power are found in Clauses 61 to 65 of Section 1 of Article V of the Cities and Villages Act. (Hurd’s Rev. Stat., 1913, c. 24, §62.) *While they do not in terms confer express authority to enact the ordinance in question* they do impose upon the Council a duty in the protection of the public from the danger of fires in private buildings growing out of the manner of construction and use of such buildings. *The protection of the public against such danger is a subject thus delegated to the municipality.* Clause 66 gives the Council authority ‘to regulate the police of the city or village and pass and enforce all necessary police ordinances.’ * * * Reasonable requirements for the protection of the lives and safety of citizens as well as their property, against destruction by fire are clearly within the police power which may be exercised by the city.”

City of Chicago v. Mandel Bros., 264 Ill. 206.

That Clause 63 aforesaid does not use the word “license,” but merely says “prevent,” is not, in our opinion, a matter of much moment, for our Supreme Court has repeatedly held

that power to license is implied in the power to "regulate," "restrain" or "prevent."

Chicago Packing Co. v. City of Chicago, 88 Ill. 221.

Kinsley v. City of Chicago, 124 Ill. 359.

Gundling v. City of Chicago, 176 Ill. 340.

City of Chicago v. Drogasawacz, 256 Ill. 34.

For the reasons above stated, we are of the opinion that the proposed ordinance is also valid and proper.

Yours very truly,

CARL J. APPELL,

Approved: *Assistant Corporation Counsel.*

JAMES W. BREEN,

Acting Corporation Counsel.

Refund of Building Permit Fee.

March 7, 1921.

HON. ROSS A. WOODHULL, Chairman, Sub-Committee on Finance.

Dear Sir:

Re Claim of Darling & Co. for Refund on Their Building Permit No. A-55868.

We submit the following in reply to your request for an opinion as to the validity of the above claim.

The building ordinances of the City of Chicago make no provision for refund on unused building permits. They differ in that regard from, for instance, certain license ordinances which sometimes provide that on the surrender of a license, granted for a fixed and definite period of time, a refund shall be made of a part of the license fee, proportionate to the unexpired term. But a building permit is one entirety and can not well be apportioned; at any rate, the ordinance does not apportion it. When the permit is issued, the city, through its officials, has done certain work in connection with the matter and has earned its fee.

Whether the applicant makes any use of his permit or not, the city can not be required to return any portion of the fee, unless it has bound itself to do so by some proper ordinance, in force when the permit was issued.

But not only do the city ordinances make no provision for refund of building permit fees, but in our opinion they clearly manifest a contrary intention. Section 229 of The Chicago Code of 1911 says:

“And if after such permit shall have been granted, the operations called for by such permit shall not be begun within six months after the date thereof, or if such operations are not completed within a reasonable time, then such permit shall be void, and no operations thereunder shall be begun or completed *until an extended permit shall be taken out by the owner or his agent, and a fee of ten per cent of the original cost of permit shall be charged for such extended permit.*”

The Code of 1905 contained essentially the same provision, except that the amount of the new fee was larger, the language being:

“until a new permit shall be taken out by the owner or his agent, and fees as herein fixed for the original permit shall be paid for such new permit.”

We are of the opinion that these provisions clearly evidence an intention on the part of the City Council that no refund shall be made of any permit fees on unused building permits. Certainly nobody would think of paying ten per cent additional (or under the old ordinance 100 per cent additional) for a new or extended permit if he could, by surrendering his original permit, get his money back and take out a new permit at the regular fee rate.

There being therefore no legal basis for any claim for a refund of the fee paid, the making of such a refund would, in our opinion, constitute a voluntary gift, which the City Council has no lawful authority to make. For it would come within the familiar rule that neither the City Council nor any other public servants can, without consideration, give away public funds or property.

Agnew v. Brall, 124 Ill. 312.

City of Chicago v. P., C., C., & St. L. Ry. Co., 244 Ill. 220.

Yours very truly,

CARL J. APPELL,

Approved: *Assistant Corporation Counsel.*

JAMES W. BREEN,
Acting Corporation Counsel.

**Payments from Bond Issue Authorized at Election,
February 22, 1921.**

March 7, 1921.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

We are in receipt of your letter of recent date, in which you ask four questions in regard to the use of funds to be obtained from the bond issue authorized at the election held February 22, 1921.

The ordinance authorizing said bonds provided for their issuance on July 1, 1921, to the extent of \$8,000,000, for the purpose of

“paying indebtedness incurred prior to Jan. 1, 1921, by the City of Chicago payable out of funds provided for general corporate purposes and for the further purpose of paying judgments heretofore rendered against the City of Chicago and outstanding on the thirty-first day of December, A. D. 1920.”

We will take up your questions in the order in which you asked them, the first being as follows:

“1. These bonds are dated July 1, 1921, and we would ask your advice as to the legality of making payments prior to July 1st out of the Corporate Fund and later reimbursing the Corporate Fund from the proceeds of the sale of the bonds.”

We know of no way in which you could legally use the bond fund for the purpose of reimbursing the general corporate fund in case you make payments therefrom, which you would otherwise pay by means of the proceeds of the bond issue.

The ordinance, as it was first drawn by the Law Department, provided for the issuance of bonds for general corporate purposes. Under that wording it would have been proper to use the money in the general corporate fund to pay the debts and judgments, which may be paid either from the general corporate fund or from the bond issue, to the extent that such money was available, and the general corporate fund could then have been reimbursed from the bond fund when the bonds were issued.

The City Council, however, saw fit to change the wording of the ordinance so that the money from the bond issue is available only for two distinct purposes. This in itself would be sufficient to preclude the possibility of reimbursing the general corporate fund, even if the payments therefrom were for the two purposes specifically mentioned. But that is not the chief difficulty, since it might be said that the payments were in fact for the purposes authorized even though they had been anticipated by payments from another source.

The great obstacle which lies in the way of making such payment is the fact that you would be issuing bonds to pay specific obligations that were already paid. This is contrary to law. We apprehend that there would be great risk in doing this, and you would be almost certain of having the validity of the bonds attacked. Such attack could be made through injunction proceedings or through objections to the tax levy. In either event it would be hard to sustain their validity. To issue bonds for the payment of debts which do not exist, cannot be justified.

We are therefore convinced that it would be inadvisable to make the payments you speak of, even though the debts could lawfully be paid out of the general corporate fund. It would defeat the object in view, because to the extent that such payments are made the bonds could not lawfully be issued.

Your second question is as follows:

“2. As to the payment of judgments obtained during 1921 for supplies or commodities furnished during 1920, out of the proceeds from the sale of these bonds; the point being as to whether such payment would be contrary to the sense of the proposition as submitted to the voters, which states that the bonds were to be used for the purpose of paying judgments heretofore rendered against the City of Chicago and outstanding on the 31st day of December, 1920.”

We believe that you would probably be within the spirit, if not the strict letter, of the law if payment of judgments entered in 1921 for debts incurred in 1920 were made from the bond fund. The authority to pay the debt exists, and

we cannot see how this authority will fail merely because the party to whom the debt is due has seen fit to secure a judgment. It would still be an obligation which you could treat as a debt of 1920. We suggest, however, that it would be better for the creditor to consent to the vacation of the judgment, because it makes a cleaner record, and the payment could not then be questioned by anybody. For the purpose of avoiding possible litigation this course is recommended.

Your next question reads as follows:

“3. As to the necessity of having the Council appropriate for judgments where the obligation is now represented by a warrant outstanding and where such obligation was regularly appropriated for in the 1920 budget or budgets of prior years.”

There is some slight question as to whether the appropriation of former years is sufficient authority for you to pay the warrants you mention out of the bond fund. There has been an appropriation, even though such appropriation set apart money from the general corporate fund and not from the fund that will come into existence when the bonds are sold. It might be that there would be an excess of caution if the sums were re-appropriated, but that would probably be the safest course to pursue.

If such payments as you suggest were to be made, they might be defended on the theory that the passage of the ordinance authorizing the bonds in itself constituted an appropriation for the purpose. We argued along this line in the case of *People ex rel. Stuckart v. Day*, 277 Ill. 543, where the question at issue was whether there could be a tax levy for bonded indebtedness which was not included in the appropriation bill and in the tax levy ordinance based thereon. The court sustained our contention that the levy was lawful, but did not pass on the precise question that is raised by your inquiry. We believe we would be in a stronger position than we were in the Day case if we had to defend such action as you speak about, because in this case there was actually an antecedent appropriation and the bonds were authorized for the express purpose of taking care of same. It is possible, therefore, that we are advising unnecessary cau-

tion when we say that it would be better to have new appropriations made.

Your last question reads:

“4. As to the legality of making an appropriation from the proceeds of these bonds to take care of unpaid bills for the year 1920 which have not as yet been vouchered and for which no judgments have been entered.”

The answer to the former question really covers this point, except that the reason for re-appropriating is necessarily stronger in the case of unpaid bills which have not yet been vouchered. We recommend a re-appropriation in such cases even if you do not ask for a re-appropriation in the case of bills for which warrants have already been drawn. It might be held that the appropriations for bills which have not been vouchered have lapsed, and that a re-appropriation is necessary whether payment is made from the general corporate fund or the bond fund. We have always held that there should be a re-appropriation in the next fiscal year in the case of unpaid bills, and we do not think it wise to depart from this practice even though there has been a fund provided for the payment of the bills in question.

The above covers all the points about which you inquired.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Obligation for Construction of Alley Outlet.

March 8, 1921.

HON. CHAS. R. FRANCIS, Commissioner of Public Works.

Dear Sir:

In answer to your recent inquiry as to the right of the Chicago & Northwestern Railway Company to bill the City of Chicago to the extent of \$9,286.03 to cover the cost of labor and material furnished by the said railway company in the construction of the alley outlet to West Kinzie Street from

the east and west alley between West Kinzie street and West Austin avenue in the block just west of Orleans street, I submit the following:

The question involved in the case is not one merely of law but largely of fact, the answer thereto depending upon the surrounding circumstances. The object of the said strip is for the purpose of providing an outlet to West Kinzie street from the east and west alley above described, which alley originally had its outlet into Orleans street prior to the elevation of Orleans street. Because of the said elevation it became necessary that the outlet of the east and west alley be diverted, and hence the latter part of Section 6 of the Franklin-Orleans Ordinance which was passed on March 25, 1916, provides as follows:

“The city will further provide an outlet to West Kinzie street for the east and west alley lying between West Kinzie street and West Austin avenue by acquiring a strip of land 18 feet wide west of and adjoining the west line of Orleans street.”

The latter is clear as to an outlet but does not state that the city or anyone else should pave the surface thereof. An outlet is defined in the Century Dictionary as follows:

“The place or the opening by which anything is let out, escapes, or is discharged; a passage outward; a means of egress; a place of exit.”

The city, no doubt, has strictly complied with that part of Section 6 of the ordinance as above stated, but the Chicago and Northwestern Railway Company might contend that, prior to the elevation of Orleans street the traffic from the said east and west alley led into Orleans street by means of a paved thoroughfare, and, that since the elevation of the said thoroughfare the diversion into West Kinzie street became necessary, and in consequence thereof required that the city should furnish an outlet similar to the one it originally had, or at least one that is usable. Reference is also made to the latter part of Section 5 of the ordinance, which provides in part as follows:

“said railroad company (Chicago & Northwestern), however, to assume no part of the cost of lowering or ele-

vating the grade of the portion of West Kinzie street which lies west of the west line of Orleans street."

Thus far it seems as if the city would be bound to pay the account claimed, providing the Chicago & Northwestern Railway Company can prove the amount is reasonable and actual, of which I express considerable doubt.

However, in the second paragraph of Section 21 it is provided in part as follows:

"The Chicago & Northwestern Railway Company will save the City of Chicago harmless from any expense whatever on account of the construction of the north approach at Orleans street."

What is meant by "any expense whatever" in the above section is a question of fact, on which there might readily be a conflict of opinion. It is true that the diversion to West Kinzie street from the said east and west alley became necessary by reason of the construction of the north approach, but whether or not that part of the ordinance lastly stated was intended to burden the Chicago and Northwestern Railway Company to pay for the paving of a strip of land not really connected with Orleans street raises the important question, which this opinion is dependent upon.

One other important factor to consider is whether or not the city was notified to pave the strip of land in question or did the Chicago and Northwestern Railway Company pave same without notice to or request by the city? From the facts presented herewith I assume it to be the latter. Section 5 of the ordinance provides in part as follows:

"that the City of Chicago will perform the work of lowering or elevating the grades of West Kinzie street, and Orleans street and Austin avenue, but the Chicago and Northwestern Railway Company *will pay* the actual cost thereof, to be, etc."

Although the latter section does not materially affect the strip of land in question, yet it shows that the City of Chicago was to do the work, and the Chicago & Northwestern Railway Company was to pay for same. Furthermore, the fact that the said railway company was to save the city harmless from *all expense whatever* on account of the construction of

the north approach, as provided in the latter part of Section 5, I am of the opinion that the expense of the paving of the strip in question was one of those expenses contemplated in said section. The reason assigned therefore is that the strip of land would not be necessary if it was not for the fact that the north approach made it so. That part of Section 6 set forth above shows that the city was to furnish an outlet, which it did, and if the city was bound to pave this outlet the ordinance would have provided accordingly; and Section 21, provides that the Chicago & Northwestern Railway Company should pay all costs necessitated by the Orleans street approach whether consequential or otherwise, except the cost of lowering or elevating the grade of the portion of West Kinzie street which lies west of the west line of Orleans street. The latter exception does not include the strip of land in question, because the said strip does not come within the meaning of "lowering or elevating," even though it lies west of the west line of Orleans street. The proper conclusion can be drawn only if the various sections of the ordinance be read in the light of the other sections.

Therefore, after a careful investigation of the Franklin-Orleans Ordinance, particularly those sections above set forth, and further, in view of the fact that the work was done without notice to or request by the city, I am of the opinion that the bill to the City of Chicago is unfounded and should not be paid, but should be borne by the Chicago & Northwestern Railway Company.

I return herewith, your letter of February 28, 1921, together with a photostat of a drawing on which is platted the provisions of part of the ordinances.

Yours very truly,

HARRY F. CHAVERIAT,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Claim for Medical Services.

March 8, 1921.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Your letter of recent date in which you transmit Council petition and doctor's bill in the claim of Frank Billoto for medical services and requesting an opinion as to the city's liability, has been referred to me.

It appears that the claimant, a minor, climbed a pole in order to save some unknown person who was hanging on the wire. When he came in contact with this man, his right hand and left side were burned by the current of electricity passing through the wire and two fingers of his right hand were necessarily amputated and he lost the complete use of his right hand.

Municipalities have been held liable by our courts in cases of similar nature.

Goetzke v. City of Chicago, 174 Ill. App. 446.

Johnson v. City of Chicago, 174 Ill. App. 414.

Schmidt v. City of Chicago, 107 Ill. App. 64.

Village of Palestine v. Siler, 225 Ill. 630.

In view of the above cited cases which hold a municipality liable, I am of the opinion that some effort should be made to compromise the matter and effect a settlement in this case out of court.

Very truly yours, ,

THADDEUS F. KUFLEWSKI,
Assistant Corporation Counsel.

Approved:

SAMUEL ETTTELSON
Corporation Counsel.

Refund of License Fee.

March 15, 1921.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

In your letter of March 9, 1921, your committee requested an opinion as to the right of the city to make a refund of \$15 where the City Furniture Company paid for a delivery wagon vehicle license of capacity one ton or less, and later traded for a White truck of more than one ton capacity, requiring a \$30 fee in the latter case as against a \$15 fee in the former.

There is no doubt that where a person, in the absence of fraud or mistake and without compulsion of the person or goods, and not under protest, pays a license fee to the city, he can not afterwards recover it back. This rule holds good even where the ordinance, by virtue of which the license fee was required, is found invalid.

City of Chicago v. Klinert, 94 Ill. App. 524, and
Holden v. City of Galena, 19 Ill. App. 409.

The policy of the City of Chicago in regard to rebate or refund of any license fee or part thereof is shown by Section 1516 of The Chicago Code of 1911, the second paragraph of which reads as follows:

“In no event shall any rebate or refund be made of any license fee or part thereof by reason of the death of the licensee or by reason of non-user of such license or by reason of a change of location or occupation of such licensee.”

This case clearly comes under the policy shown by the the above section, as it is a request for a refund merely by reason of non-user of the vehicle license.

I would therefore advise you that there is no cause for refund of any portion of the vehicle license fee in question.

Yours very truly,

THADDEUS F. KUFLEWSKI,

Approved:

Assistant Corporation Counsel.

JAMES W. BREEN,

Acting Corporation Counsel.

Illinois Central Viaduct at 93d Street.

March 17, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

Your letter of March 2, 1921, together with a petition signed by nearly five hundred property owners and residents in the neighborhood of 93rd street and the right of way of the Illinois Central Railroad Company, and a copy of the report of Thomas H. Byrne, Superintendent of Streets, stating that the temporary false work now in place is in bad condition and that the railroad companies have not as yet agreed upon the prosecution of the work for the proposed subway, have been received by me, and in response to your request for an opinion suggesting how this track elevation ordinance may be enforced through your department, I submit the following:

The entire matter is controlled and governed by the ordinance passed on April 5, 1911, Council Proceedings pages 4398 to 4429. Section 7, Paragraph 1, provides in part as follows:

“Before doing any work under this ordinance each of said companies shall file with the City Clerk of the City of Chicago its bond, in form approved by the Corporation Counsel of the City of Chicago in the penal sum of \$25,000, conditioned that in constructing the improvement herein specified it shall furnish and use such material and employ such workmanship as will insure such improvements to be free from all defects; * * * and, conditioned further, that if said company or companies shall for a period of ten days after being notified by the Commissioner of Public Works to repair said improvement, fail, neglect or refuse to make such repairs, the City of Chicago may make such repairs or have the same made, the said company or companies, shall upon demand pay the cost thereof to the City of Chicago.”

Although the bonds lastly mentioned are intended for the faithful performance of the different companies in making the necessary repairs after the improvements are completed and also to insure the city for ten years against defects therein, still it can reasonably be inferred that the bonds can

be attacked if the companies fail to complete, or unreasonably delay the execution of, the various elevations and subways.

But if the company or companies are working diligently on the improvements there can be no complaint because the time for completion is not as yet at hand and to corroborate the foregoing statement reference is made to Section 12, paragraph 1, which provides in effect that the various railroad companies have until December 31, 1921 to complete said improvements, unless prevented by strikes, riots or other causes in which event the time is to be extended such length of time as is equal to the length of time that such unforeseen contingencies existed. For this reason the companies can not be expected to have completed the various improvements noted in the ordinance. However, the companies can not delay the prosecution of the work until December 31, 1921, and expect then to start the work, but they must work on same with such efforts and diligence as to reasonably finish said improvements by that time.

Section 15 of the ordinance in effect provides that each and every company required by this ordinance to elevate its tracks shall do its portion of the work in accordance with the terms hereof (of the ordinance) *in apt and proper time* so as not to interfere with the proper and orderly prosecution of such work as a whole, and, should any company fail or neglect so to prosecute its work, the commissioner of public works shall have, and is hereby given the right, power and authority to *give ten day notice in writing* to such delinquent company *to prosecute its work*. It further provides that if the company shall fail or neglect to comply with said notice the commissioner of public works may take charge and cause such work to be done and the expense thereof shall be paid by said delinquent company. Therefore, if there is any unreasonable delay in the prosecution of said elevation and subways the commissioner of public works should serve a notice on the company or companies giving them ten days' time to commence or continue the work in such manner as will insure its completion in the proper time.

Furthermore, assuming that the companies are not de-

laying the work in general, still it does not give them the privilege to make any street or sidewalk dangerous or deny the proper use thereof by committing nuisances through improper and unsafe temporary structures or inadequate drainage on the said temporary structures because of the fact that the last sentence of the ordinance provides that nothing in the ordinance contained shall be a waiver or surrender of the police power of the city or be taken in any way to deprive the city of the right to properly exercise such power. For this reason there is no excuse for its inadequate drainage facilities and poor temporary structures, which may tend to endanger the public welfare of the people in the neighboring community as complained of in said petition. Reference is also made to Section 8, which provides the following:

“That permission and authority are hereby given to said railroad and railway companies whenever the same shall be necessary in the prosecution of the work they are herein authorized or required to perform, to obstruct temporarily any public street, avenue or alley to such extent and for such length of time as may be approved by the Commissioner of Public Works; and they are also hereby authorized whenever the same shall be necessary, to erect and maintain temporary tracks, structures and false work in any of the said streets and avenues during the construction of their said elevated railroads, *subject to the like approval of the Commissioner of Public Works.*”

This section clearly shows that all the temporary structures are to be approved by the commissioner of public works and if they are inadequate or unsatisfactory he is to give notice to the company at fault notifying them to correct same.

Therefore, the commissioner of public works should give notice to the company or companies at fault, communicating to them the fact that complaints have been made as stated in the petition and that after a thorough investigation by the city the same have been found to be true, and in consequence of this, should alter same within the space of ten days after the service of said notice, and that a failure to comply with the notification will compel the City of Chicago

to correct same and hence will subject said company to the cost therefor. Finally, if the prosecution of the work is carried on for the completion of the said elevation and subways in a reasonably diligent manner so that it will be completed by December 31, 1921, or soon thereafter, nothing further can be done as to that, but, unless this be the actual fact, the commissioner of public works should serve notice on the said company or companies ordering them to complete same and giving them ten days' time to start therewith, and that failure so to do will compel the city to start or continue the same and charge the cost thereof to the company responsible for such failure.

The petition, together with your letter and that of Thomas H. Byrne, Superintendent of Streets, are returned herewith.

Yours very truly,

HARRY F. CHAVERIAT,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Licensing Busses Operating Partly Within and Partly Without City.

March 21, 1921.

HON. GUY MADDEROM, Alderman 9th Ward.

Dear Sir:

Replying to your request for an opinion as to whether the owner of a motor bus route, running from Oakland and Thornton and operating principally outside the city limits, but which runs a distance into the city to discharge passengers, who come into the city to do business, but collects no fee from the people of Chicago, who, moreover, has paid his registration fee to the secretary of state, as well as his license fee at Thornton, where he resides, is required to pay any license fee to the City of Chicago, we beg to advise:

Section 26 of the Motor Vehicle Act provides:

“No owner of a motor vehicle or motor bicycle who shall have obtained a certificate from the secretary of

state and paid the registration fee as hereinbefore provided, shall be required by any city, village, town or other municipal corporation within the state, *other than that in which said owner resides*, to pay any tax or license fee for the use of such motor vehicle or motor bicycle.

* * * Provided, that nothing in this act contained shall be construed as affecting the power of municipal corporations to make and enforce ordinances, rules and regulations affecting motor trucks and motor driven commercial vehicles *used within their limits for public hire*, or for making and enforcing reasonable traffic and other regulations, except as to rates of speed, not inconsistent with the provisions hereof."

You will note from the above section of the statute that a person who has paid his registration fee to the secretary of state and obtained a certificate from him, cannot be required to pay any further tax or license fee to any municipality except that in which he resides, provided the vehicle is kept merely for his own *personal use*, but that exemption does not apply to vehicles kept for *hire*. Thus, for instance, if a man lives in Evanston or Oak Park, he is not required to pay any license fee to the City of Chicago on his private automobile (assuming that he has paid the state registration fee), but he is required to pay such license fees on taxicabs that he may be operating within the limits of the latter city.

The case you mention is not so simple, however, and it may be a serious question whether the party you speak of is operating his busses for hire "within the limits" of the City of Chicago. If he does a *bona fide* interurban business and does not carry passengers from point to point within the city, or from points within the city to points just outside, in other words, if the short distance that he travels within the city limits is merely *incidental* to his outside traffic, and no charge is made to his passengers therefor, then we are of the opinion that he would not be required to pay any license fee to the City of Chicago. But, on the other hand, if he transports passengers for hire from place to place within the City of Chicago, or if that portion of his route which lies within the City of Chicago is not merely incidental but a material part of the trip, and is paid for as such, or, at any rate, enters

seriously into consideration in determining the fare to be paid, then we are of the opinion that he uses his vehicles “*within the limits*” of the City of Chicago “for public hire” and is required to pay such license fees as are prescribed by the ordinances of the city. Without further knowledge of the precise facts in the case, we cannot advise you more definitely.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Refund on Deposit for Water Main.

March 22, 1921.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

In reply to your request for an opinion relative to the validity of, and the power of the city to pay the claim of Citizens' Construction Company, successors to Gaffney & Long Construction Company, for a refund on deposit for water main laid in Central Park avenue between Fulton and Lake streets, and amounting to \$710.38, we beg to say:

The facts, as we gather from the files and from the Council Proceedings, are as follows:

In 1899 the Gaffney & Long Construction Company had been awarded a contract to pave Central Park Avenue from Fulton street to Lake street. Later it was discovered that it would be necessary to lay an 8-inch water main in the street before the pavement could be laid. No provision had been made for that in the ordinance, and the city had no appropriation for the purpose. The Gaffney & Long Construction Company then, in order to protect their paving contract, advanced to the city a sum sufficient to cover the cost of the laying of such main, and the city then laid the water main, under an ordinance of the city, now embodied in The Chicago Code of 1911 as section 2128, which reads as follows:

“The commissioner of public works may extend water mains where owners of the property, or persons desiring such extension, shall advance and pay into the city treasury a sum of money equal to the entire cost thereof; and whenever, upon a proper survey, it is shown that a permanent annual revenue of ten cents per lineal foot is being derived from such water mains so laid, then such money so advanced as aforesaid shall be repaid to the person or persons so advancing the same; provided, however, if the money so advanced is not paid back within two years, interest at the rate of three and one-half per cent per annum shall be allowed after the expiration of said two years, until paid.”

We understand further that this main has never produced a revenue of ten cents per lineal foot, and that there is little likelihood that it ever will do so, because the west side of the street is entirely West Park property, and the other side is still vacant. But the claimant contends that since millions of gallons of water have passed through the main for park purposes, and the city therefore has had the *use* of the main for these twenty years, it should now be required to pay for the same.

The facts above stated do not, in our opinion, constitute any legal basis for a claim for refund. The company in advancing to the city the money for the laying of the main, made a definite contract with the city, one of the terms of which was that the company should never be entitled to any refund unless, nor until, the city should receive a permanent *revenue* from the main, of at least ten cents per lineal foot. That the city may have had considerable *benefit* from the main may be true, but the contract does not require any refund until the city has received the stipulated *revenue*, regardless of what other benefits it may have received. The company itself was also benefited by the laying of the main, for it was thereby enabled to carry out a valuable contract, which it might otherwise have been unable to avail itself of. No doubt this was the principal consideration for their making the deposit in question. They knew, when they made it, that they would be entitled to a refund only on certain contingencies, which might never happen. They knew, at that

time, that Garfield Park was on one side of the street and vacant property on the other and that the main might never prove a paying proposition. It will thus be seen that the company has now no right to demand payment of this claim.

But granting that the claim is not yet due and not yet enforceable, there still remains the question whether the City Council would not have the power to voluntarily pay it, if they saw fit. If it were an *absolute* indebtedness, payable unconditionally at some future date, there would be little doubt about it. For this is a matter solely between the city and the claimant; the rights of no third parties are involved. (It differs in that regard from ordinary local improvement contracts, where the rights of other bidders, sureties on the bond, etc., are involved.) But this is not an absolute indebtedness, it is conditional upon the happening of a certain contingency, which has not yet happened, and may, in fact, never occur. Therefore, this may never become a valid claim against the city. That being the case, the City Council has no lawful authority to pay the same. For, like all other trustees of public funds, the City Council has no authority to give away such funds without consideration.

We are not unmindful of the familiar principle that the City Council has power to settle *disputed* claims. But there must at least be a *bona fide* dispute. Here there is none. The ordinance is perfectly plain, and the company does not seriously contend that there is anything due them at the present time. The most that they can, or do, claim is that they might *possibly* become entitled to something in the future. There is, therefore, no sufficient basis for a compromise, even if the company were willing to consider a compromise, which we have not heard that they are.

If there were otherwise any doubt about this matter, it is emphatically dispelled by Section 2131 of The Chicago Code of 1911, where we read:

“No such money shall be repaid *unless* the permanent annual water rates derived by reason of the laying of such water main for which any such receipt was given,

shall at the time of such proposed repayment, per annum, equal at least ten cents per lineal foot of main so laid.”

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Close of City Hall on Good Friday.

March 23, 1921.

HON. WILLIAM HALE THOMPSON, Mayor.

Dear Sir:

We are in receipt of your communication of recent date, forwarding to us a petition signed by seventeen members of the City Council and one member-elect, requesting you to order all departments of the Municipal Government closed on Good Friday, March 25, 1921, with the exception of the Departments of Police, Health, Fire, Gas and Electricity, in which communication you ask us to advise you as to whether you have the power or authority to comply with the request of the signers of the said petition.

In reply, we beg leave to advise you that the office hours of the respective offices of the Municipal Government, and the days on which the departments may be closed, are fixed and regulated by Sections 1661 and 1662 of The Chicago Code of 1911, which sections provide as follows:

“1661. OFFICE HOURS.) The offices of the respective city officers, except as hereinafter mentioned, shall be open from nine o'clock in the forenoon to five o'clock in the afternoon on every day except Sundays, New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas Day, and from nine o'clock in the forenoon to twelve o'clock noon on Saturdays. The office of the mayor shall be open at such hours as he shall prescribe. The office of the city treasurer shall be open during the usual banking hours observed by the banks throughout the city. The office of the city comptroller

shall be open from nine o'clock in the forenoon to three o'clock in the afternoon.

"1662. PENALTY.) Any officer violating any provision of this chapter shall be deemed guilty of misconduct in office and be liable to removal from office therefor."

The closing of the city hall on holidays has always been a matter within the discretion of the City Council, and the council has not delegated such authority to any executive officer of the city.

The City Council has always considered the regulation of office hours and the closing of the city hall as one of its prerogatives. The petition presented to you does not even contain the names of a majority of the members of the City Council, and even if it did, it is my opinion that it would not confer any authority on you to close the City Hall.

I have examined the ordinances of the city carefully, and cannot find any provision in the same conferring any discretionary power whatsoever upon you in the matter of closing the City Hall.

In order for you to issue an order closing the City Hall on Friday, March 25, 1921, it will be necessary for the City Council to pass an order directing you to do so. In the absence of such action on the part of the City Council, you have no authority to issue an order closing the municipal departments of the city on the said day.

Yours very truly,

JAMES W. BREEN,
Acting Corporation Counsel.

Right of Checker Taxi Cab Co. to a License.

March 25, 1921.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

Replying to your letter of March 17, 1921, with attached communication of March 11, 1921, from the Checker Taxi Cab Company. We beg to advise that the question whether public vehicle licenses should be issued to the Checker Taxi Cab

Company, depends upon certain facts, or rather upon one ultimate fact, which must first be determined by the Public Vehicle Commission; namely, whether the Checker Taxi Cab Company is the *bona fide* owner of the taxicabs it seeks licenses for.

Section 2 of the ordinances of December 29, 1919, reads as follows:

“It shall be the duty of the Public Vehicle License Commission of the City of Chicago to license and inspect public vehicles, taximeters, to conduct the examination of applicants for licenses to drive public vehicles and the licensing of said drivers, and to make all necessary rules and regulations for the proper enforcement of the provisions of this ordinance, and for the protection of patrons of all such public vehicles.”

And Section 3 of the same ordinance says, among other things:

“Applicants for licenses for public vehicles shall be made *by the owner* upon blanks to be furnished by the Public Vehicle License Commission, and such application shall contain the *full name and address of the owner*, the class of vehicles for which a license is desired,” etc.

We are of the opinion that before the commission can issue any license to an owner, they must first find out who the owner is, and in doing that, they are not required to accept the mere say so of the applicant, but may demand more satisfactory proof. Especially is this true where the commission finds that there is some dispute about the ownership, or that there are other suspicious circumstances connected with the case.

In the case of the Checker Taxi Cab Company, the charge has repeatedly been made that they are not the *bona fide* owners of the taxicabs for which they demand licenses; that they assert such ownership when they seek rights and privileges, such as vehicle licenses, but deny ownership when liabilities are concerned, such as the payment of taxes, or damages for personal injuries.

If the commission finds these charges to be true, they would certainly constitute a species of fraud upon the public,

which would justify the commission in refusing the licenses applied for.

The company questions the right of the commission to investigate the ownership of the taxicabs on the alleged ground that this would be the exercise of a judicial power by a ministerial body, but in our opinion there is nothing to that point.

The investigation in this case would not be essentially different in its nature from that required in any other case where licenses are applied for, in which cases the Supreme Court has repeatedly held that while the investigation may involve powers that are judicial in a certain sense of the word, nevertheless, they are not judicial powers in the strict sense thereof. Thus in the case of *Block v. City of Chicago*, 239 Ill. 251, the so-called moving picture ordinance was attacked as unconstitutional on the alleged ground that it vested judicial power in the police to determine what plays were moral and proper, but the Supreme Court held that while the ordinance vested "judgment and discretion" in the police, it did not invest them with any judicial power in the strict sense of the word. The court added:

"Government could not be carried on if nothing could be left to the judgment and discretion of administrative officers."

In the case of *People v. Appelbaum*, 251 Ill. 18, the validity of the Medical Practice Act was attacked on a similar ground; namely, the alleged ground that it delegated judicial power to the State Board of Health (a ministerial body) in granting and revoking licenses to practice medicine. But the Supreme Court said:

"The possession of the required qualifications must be ascertained by some authority, and the legislature has imposed that duty upon the State Board of Health. In the administration of the law the State Board of Health necessarily exercises *discretion and judgment* in determining whether or not an applicant possesses the required qualifications, and *to that extent its action is judicial in character*, but it is not the action of a court or action appropriate for a court. It is similar in its nature to the

acts of assessors in valuing property for taxation; the board of review in reviewing such valuations; the clerks of courts and of sheriffs in approving bonds taken by them; of commissioners of highways in laying out and opening roads; of city councils in granting and revoking licenses to keep dram shops; or of superintendents of schools in granting or revoking teachers' certificates. *In none of these cases does the tribunal engaged in the execution of the law exercise judicial power within the meaning of the constitution.*"

To the same effect is *People v. Stokes*, 281 Ill. 159.

We are of the opinion, therefore, that there is no question about the power of the commission to demand that the applicant produce satisfactory evidence that it is the *bona fide* owner of the taxi cabs in question before any license will be issued to the same.

In the letter from the company, which you sent us, they refer to several cases that have been up in the local courts. In none of those cases was the Checker Taxi Cab Company a party. Moreover, those cases depended upon different facts from those involved here, and we do not believe, therefore, that they affect the present situation one way or another. In the case before Judge Morrill a writ of mandamus was issued against the city to grant a license to a certain other company for the year 1920. From that judgment the city took an appeal to the Appellate Court. But before the case could be heard there, the year 1920 expired, so that case became a dead issue. The other cases mentioned were decided upon special facts in those cases and were against other parties, and, therefore, we do not consider the same as having any material bearing upon the present question.

It may be true, as the company contends, that a driver, though he may be the real owner of the car, may, by permitting the company to paint its name on the same, and by posing as an agent of the company, be estopped from afterwards asserting ownership to the car, as against creditors of the company. (*Bergen v. Riggs*, 34 Ill. 170; *R. R. Co. v. Altgen*, 112 App. 471.) But, however that may be, it would take a lawsuit to settle a question that the commission ought to determine before the license is issued.

Our conclusion is, therefore, that if the commission finds that the Checker Taxi Cab Company is the *bona fide* owner of the taxicabs for which it is seeking licenses, and asserts such ownership for all purposes, when liabilities as well as when rights and privileges are concerned, the commission ought to issue the requested licenses. But, on the other hand, if the commission finds that the company is not the *bona fide* owner of the cabs, or that the ownership thereof is of such a doubtful or shifting nature as to make it doubtful whether a patron could enforce a claim against the company without becoming involved in vexatious litigation with drivers who likewise claim ownership of the cabs, then we are of the opinion that the commission would be justified in refusing such licenses.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Riparian Rights on North Shore.

March 26, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Supplement to Opinion dated February 23, 1921.

Dear Sir:

On February 23, 1921, I rendered an opinion in which I indicated that the City of Chicago, in the event it purchased the property described in said opinion, would obtain the riparian rights thereto, but as to whether or not the city could at all times retain the riparian rights is another question which will be taken up herein.

I am informed that the North Shore Park District is purchasing the riparian rights from the owners of property in the vicinity of the property in question and, according to the statutes of Illinois, the park districts have the express authority to condemn property where it cannot be purchased.

See Chapter 105 of Hurd's Revised Statutes, Sections 162, 163, 166, 176, 177 and 234.

The important question, however, is whether or not the North Shore Park District, a public organization, organized for public purposes, can condemn such property belonging to the City of Chicago, which is already being used for a public purpose. The power of eminent domain, being a prerogative of sovereignty, is not exhausted by use, and can only be limited by the public exigency upon which it is founded. And while property condemned for a particular public use or purpose cannot be devoted to a different use or purpose, the rule is well established that the property previously devoted to one public use may be taken under the power of eminent domain for another and different public purpose.

See 20 Corpus Juris, page 598.

The general rule is that the power of eminent domain may be exercised in favor of public uses over any and all property, private and even *public*; and the property and franchises of corporations as well as of individuals, although dedicated to public use, may be taken for other public uses. However, the cases in which the above principle has been laid down were those where the subsequent condemnation of property was by a public or private corporation against a *private* corporation occupying the property to be taken for a *public* purpose. But the hypothesis in this case is that the property is owned by a *municipal corporation* for a *public purpose*, for example a playground, or bathing beach, and that the property so publicly used is attempted to be taken by another *public organization* for another *public use*, inconsistent to the use to which it is now applied. In general, the law is that property, already devoted to a public use cannot be taken for another public use which will totally destroy or materially impair or interfere with the former use, unless the intention of the Legislature that it should be so taken has been manifested in express terms or by necessary implication, mere general authority to exercise the power of eminent domain being in such case insufficient; and this is so whether the property was acquired by the public by *condemnation* or by *purchase*.

The same rule also applies to property *about* to be lawfully appropriated, although the appropriation is not complete.

There have been no decisions in this state that are directly in point to the question involved herein, but analagous hereto is the case of *City of Moline v. Greene*, in which the City attempted to widen a street and to do this it attempted to condemn part of the public library. In denying the right of the city to condemn, the court said:

“Conceding that the Legislature has power to authorize public property devoted to one public use to be taken and appropriated to a different use for the public benefit, the question here for decision is, has the Legislature by any act adopted by it, authorized the taking of the library property by appellant? The library is a public library and the land sought to be taken from it is devoted to a public use. The general rule is, that such property cannot be taken and appropriated to another and different use unless the legislative intent to so take it has been manifested in express terms or by necessary implication. *Chicago and Alton Railroad Co. v. City of Pontiac*, 169 Ill. 155; *Chicago and Northwestern Railway Co. v. City of Chicago*, 151 *id.* 348; 10 Am. & Eng. Encyc. of Law, 1094; 15 Cyc. 616.”

City of Moline v. Greene, 252 Ill. 475, 477.

From the last case it appears that the public property cannot be taken *unless* there be legislative authority. The act “For the Organization of Park Districts and the Transfer of Submerged Lands,” under which the North Shore Park District is organized, specifically provides that the park districts shall have the power of eminent domain, but nowhere in the entire act does it provide that the organization be allowed to condemn *public property*. On the contrary, the second paragraph of Section 176 of Chapter 105 of Hurd’s Revised Statutes provides as follows:

“And said park district shall have power to acquire by *lease or permit* from any other *municipal corporation* the right to occupy and use real estate, lands and riparian estates, for park and playground purposes, and to improve, maintain and equip the same as a park or playground; * * *.”

It clearly appears from the latter section that the statute, although not expressly prohibiting, does not give the park districts power to condemn property belonging to other municipal corporations, but specifically provides that it shall have the power to acquire property by *lease or permit*. This indicates that unless a municipal corporation voluntarily leases or permits the use of its lands, the park district is powerless as to such lands. This would likewise be true where the property is owned by the county instead of a city. That the park district cannot condemn public property without statutory authority is unquestioned, because the general rule is that land already devoted to public use as a park, square or common, cannot be appropriated for railroads or *other public* uses inconsistent with the prior use, unless the power to make such appropriation is conferred expressly or by necessary implication.

Jacksonville v. Jacksonville R. R. Co., 67 Ill. 540.

Davis v. Nichols, 39 Ill. App. 610.

Furthermore, the use that the park district would attempt to make of the land in question would, no doubt, be an entirely different use from what the city contemplates doing with it and would perhaps destroy the former use altogether. The law is well settled on this and reference is made to the case of *City of Moline v. Greene*, where the court said:

“Cases are cited by appellant from other jurisdictions where a general grant of power to take property has been construed to authorize an appropriation of property devoted to a public use to another use when it does not essentially interfere with the public use to which the property is already devoted. But those cases, we think, can have no application to this case, for the reason that it is proposed to take the land from the library and devote it to a use that will prohibit the library hereafter from any use of or control over it.”

Likewise with the contemplated purchase of land in question which the city would, no doubt, use as a bathing beach, and the taking away of the riparian rights thereof would prohibit the city's control over the essential part of the property. Notwithstanding the fact that the Illinois statute

is clear as to the power of eminent domain permitted the different park districts, still we see from the latter case that the courts of our state also have a tendency of limiting the power where such park districts seek to condemn property that already is used by the public.

Finally, I am also of the opinion that the park district cannot even substantially interfere with the use of the land owned or to be owned by the city, and this is substantiated in the following language by our court:

“Appellant argues that taking ten feet of land will not destroy the public building; that it will have sufficient ground for carrying out the purpose for which it was established. The case must be controlled by legal principles, and not by considering the practice and effect of allowing the taking of the land in this particular case. If it is held appellant has authority to take part of the property, it would necessarily require holding that all of the property could be taken by virtue of the same authority, if that were sought to be done. Our conclusion upon this branch of the case is, that *no authority exists in appellant to take the property of the public library for the purpose of devoting it to a public street.*”

City of Moline v. Greene, 252 Ill. 475, at page 479.

Therefore, in view of the different authorities cited herein, including the express provisions of the Illinois statutes above set forth, I am of the opinion that the city, in the event it purchased the property fully described in the opinion of February 23, 1921, would not only obtain the riparian rights of said property, but could retain same without interference by any other public organization, including the North Shore Park District.

I am enclosing herewith the opinion of February 23, 1921, which should be read in connection with this letter.

Yours very truly,

HARRY F. CHAVERIAT,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Placing of Signal Lights at Subways.

March 31, 1921.

HON. WM. G. KEITH, Commissioner of Gas and Electricity.
Dear Sir:

Replying to your request for an opinion from the corporation counsel as to the power of the city to compel railroad companies, who have elevated their tracks and support their girders, at street crossings, upon columns located in the street, to place signal lights upon such columns, in order to warn approaching vehicles of such obstructions in the street, we beg to advise you that the power of the city in that regard depends, in our opinion, upon the question whether such columns are *unsafe* or *dangerous* without such signal lights.

Section 8 of the act of 1874, "in relation to fencing and operating railroads," reads as follows:

"Hereafter at all of the railroad crossings of highways and streets in this state, the several railroad corporations in this state shall construct and *maintain* said crossings, and the approaches thereto within their respective rights of way, *so that at all times they shall be safe as to persons and property.*"

Our Supreme Court has repeatedly held that this statute is a valid exercise of the police power of the state.

C. & N. W. Ry. Co. v. City of Chicago, 140 Ill. 309,
City of Bloomington v. I. C. R. R. Co., 154 Ill. 539.

In the case of *Chicago v. P., Ft. W. & C. Ry. Co.*, 247 Ill. 319, our Supreme Court said:

"There can be no doubt that * * * under the statutes of the state concerning the control of railways, the public authorities can compel appellant (railway company) to construct and maintain *proper crossings* at streets, alleys and highways."

The above statute applies not only to crossings that existed when the railroad was built but also to any crossings afterwards created.

C. & N. W. Ry. Co. v. City of Chicago, 140 Ill. 309.

Bloomington v. I. C. R. R. Co., 154 Ill. 539.

Waterbury v. C., M. & St. P. Ry. Co., 207 Ill. App. 375.

That a “*crossing*” is just as much a crossing when the railroad track crosses on an overhead structure as when it crosses at grade, can not be doubted.

People v. I. C. R. Co., 235 Ill. 374.

Blooming v. I. C. R. Co., 154 Ill. 539.

At the same time, it must be admitted that an elevated crossing is a *different kind* of a crossing from a grade crossing, and that the *degree of care* required in one case is much greater than that required in the other.

City of Chicago v. Pennsylvania Co., 252 Ill. 185.

That the columns in question may have been placed in the street under the authority of ordinances of the city, which did not make any provision for the placing of signal lights on the same, does not, in our opinion, estop the city from now requiring signal lights, or other proper safety devices, to be placed and maintained on the same. For the above statute is a state law, prescribing safety requirements, *which the city has no power to waive*.

City of Chicago v. P. C. C. & St. L. R. Co., 146 Ill. App. 403.

Northern Pac. R. Co. v. State of Minn., 208 U. S. 583.

In the case last cited, the Supreme Court of the United States held that while a state or a municipality may waive a property right, *it can not waive a duty* imposed upon it to protect the public.

In the case of elevated structures, however, the company is required only to make the structure itself safe. The duty to provide a safe crossing does not require it to keep the sidewalks or pavements beneath their structures in repair, or assume other burdens not connected with the structure itself.

People v. Illinois Cent. R. R. Co., 235 Ill. 374.

Nor is it, in the absence of any contract with the city, required to maintain any general lighting system in the sub-

ways, under its elevated structures, which it is ordinarily the duty of the city to supply.

City of Chicago v. Pennsylvania Co., 252 Ill. 185.

But in each of the two cases last cited the court said:

“Appellee (railroad company) is required to maintain its structures supporting the tracks in such condition as to render it safe for persons and property passing underneath them.”

The case of *City of Chicago v. Pennsylvania Co.*, *supra*, may, at first blush, seem inconsistent with the views we here express. But upon careful reading we do not believe that it will be found to hold anything contrary to what we have stated. In that case the Supreme Court merely held that the railroad company, after having, under a contract with the city, elevated its tracks, would not thereafter be liable for the *indirect* consequences of such elevation, namely, that the subway under such elevation was thereby darkened and required the installation of further lights; that the lighting of streets was a duty incumbent upon the city, which it could not, in the absence of a contract to that effect, shift upon the railroad company.

But it is apparent that signal lights are something very different from ordinary street lights. They serve an entirely different purpose. Indeed, they are practically useless for lighting purposes. There is no duty on the part of the city to furnish them. Their only purpose in this case would be to render the *structure itself*, placed by the railroad company *in the street*, safe, by warning approaching vehicles of the presence of the *structure itself*. This cannot be said to be—as was the case in the *Pennsylvania Co.* case—a discrimination against the railroad company, for anybody else who places an obstruction in the street, even with the permission of the city, is generally required to put signal lights on the same, after dark. Indeed, it seems to us that the law would discriminate *in favor* of railroad companies if it would thus permit them to escape this common duty.

In the *Pennsylvania Company* case, it was not claimed that the structure itself was dangerous. The roadbed appears

to have been perfectly unobstructed. If there were any columns in the street, no point was made of it in the case. The street was a little dark, but it does not appear that it was much darker than any ordinary street at night. The sole question was, as the Supreme Court expressed it:

“It is only contended that defendant in error has the right to require plaintiff in error to maintain lights at this subway because the building of the structure required by the elevation ordinance has darkened the street. * * * The city has no more right to require plaintiff in error to maintain lights in this subway merely for the reason that its structure has tended to darken the street, than it has to require the owners of buildings along the line of any street to keep the street lighted because the buildings, on account of their height, have tended to darken the street and make it less safe for travel. To require plaintiff in error to maintain such lights would be to deny it the *equal protection of the laws*.”

Manifestly, however, this discussion of the *indirect* consequences of track elevations has nothing to do with the question of requiring the company to place signal lights on *direct* obstructions placed by the company in the very roadbed of the street. The court, moreover, pointed out in that case that it differed from the case of *City of Chicago v. Union Traction Co.*, 199 Ill. 259, in that the ordinance in the latter case (which required the street car company to remove dirt, snow, etc., from the portion of the street occupied by it) related to making the *structure itself in the street* (the tracks) safe, and was therefore a valid exercise of the city's general police power.

In the case of *Northern Pacific Railway Company v. State of Minnesota ex rel. City of Duluth*, 208 U. S. 583, the City of Duluth had passed an ordinance requiring the railroad company to make certain repairs on a viaduct crossing their tracks. The company took the position that the viaduct had been built under an agreement with the city which contained no provision as to any repairs by the company. But the Supreme Court of the United States held that the city had the authority under its general police power to require the

company to keep the viaduct in a safe condition, and that this authority could not be contracted away. The court said:

“But it is alleged that at the time this contract was made with the railroad company it was at least doubtful as to what the rights of the parties were, and that the contract was a legitimate compromise between the parties, which ought to be carried out. *But the exercise of the police power can not be limited by contract, for reasons of public policy, nor can it be destroyed by compromise, and it is immaterial upon what consideration the contracts rest, as it is beyond the authority of the state or the municipality to abrogate this power so necessary to the public safety.*”

In the case of *I. C. R. R. Co. v. Stewart*, 230 Ill. 204, the Supreme Court of Illinois said:

“Appellant was under a statutory duty, wholly independent of the ordinance, to maintain its crossings in a reasonably safe condition, and it can not justify a negligent performance of this duty on the ground that the crossing was put in under the mandate of the city ordinance. It was the plain duty of the appellant to obey the mandate of this statute, and if it negligently failed to observe that duty and in consequence appellee was injured it will not be permitted to set up the defence that its disregard of the statute was at the mandate of the village.”

Aside from the above statute, therefore, railroads are subject to the police power of the state and the reasonable regulations that may be passed in pursuance thereof, for the protection of the life, health and safety of the public.

In *C. & N. W. Ry. Co. v. City of Chicago*, 140 Ill. 309, the court said:

“Railroad companies in their relation to highways and streets which intersect their rights of way are subject to the control of the police power of the state—that power of which this court has said, that ‘it may be assumed that it is a power co-extensive with self protection and is not inaptly termed the law of overruling necessity.’ (*Lake View v. The Rose Hill Cemetery Co.*, 70 Ill. 191.)”

In addition to its general police power, the city has also been given full power to regulate the use of streets and to

prevent encroachments upon the same. We are of the opinion therefore, that the city has full power to compel the railroads to place signal lights upon the columns in question, if it finds that the columns without such signal lights are unsafe and dangerous to the public. Whether they are safe or what further requirements are necessary to render them safe, are primarily legislative questions to be determined by the City Council.

C. & A. Ry. Co. v. Averill, 224 Ill. 516.

Where the life, health and safety of the public are concerned the police power of the city is very broad. It is limited only by the condition that it must be exercised reasonably. The power of the city to regulate the use of streets is also very broad. If, therefore, the City Council should decide that the columns located in the streets, as above mentioned, are unsafe or dangerous to the public in their present condition, it has, in our opinion, full power to make any reasonable regulations it sees fit, in order to render them safe. This includes the power to compel the railroad company to place signal lights on the same, if the City Council should deem that to be the most desirable way of removing the danger to the public.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Issuance of Public Vehicle License Under Writ of Mandamus.

April 2, 1921.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

Replying to your request for an opinion from the corporation counsel as to what you should do in regard to a certain peremptory writ of mandamus, served on you on the 1st instant, commanding the issuance of a public vehicle li-

cense for the year 1920 to the Morrison Hotel Taxi Service, it is our advice that you disregard the same.

The year 1920 having expired, the Public Vehicle License Commission is as powerless now to issue a license for that year as they would be if their term of office had expired. They still had such authority at the date when the writ of mandamus was awarded by the court—in December, 1920—but before the actual issuance of the writ by the clerk, their authority had ceased.

Our Supreme Court has repeatedly held that, if after a writ of mandamus has been awarded, but before it is issued and served, events occur which render compliance with the writ illegal or impossible of performance, this will excuse compliance therewith by the party on whom the writ was served. It was so held in the following cases:

Commissioner of Highways v. People, 31 Ill. 97.

Vance v. Rankin, 194 Ill. 625.

Charleston v. Moore, 195 Ill. 221.

Charleston v. Wiley, 195 Ill. 433.

Clearly the expiration of the year 1920 constituted such an event. Moreover, it is an event of which the court must take judicial notice.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Liability of City for Federal Tax on Commodities
Purchased by It.**

April 5, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.
Dear Sir:

In reply to your inquiry whether the City of Chicago is liable for the government commodity tax on seven flushers purchased from the Mack-International Motor Truck Corporation, at the price of \$57,000 (that being the full amount au-

thorized by Council Ordinance for that purpose), we beg to state that we find no provision in the War Revenue Act for the payment of such tax by the purchaser. The act contains this provision:

“Each manufacturer, producer or importer of any of the articles enumerated in Section 600 shall make monthly returns under oath in duplicate *and pay the taxes imposed* on such articles by this title to the collector of internal revenue for the district in which is located the principal place of business.”

It will be noted that this provision is very different from that in regard to, for instance, theaters and other amusement places, where it is specifically provided that the management of such places *shall collect the tax from their patrons* and remit it to the collector of internal revenue.

Unless, therefore, some agreement was made by the city, at the time these flushers were purchased, to pay the government commodity tax (and, as we understand it, nothing of that kind was done), we are of the opinion that the city is not liable for the tax in question.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Status of Subdivision Dock Line.

April 5, 1921.

MR. JAMES J. McCOMB, Harbor Master.

Dear Sir:

Your letter of March 17, 1921, in which you state that A. M. Castle & Company have made application for permission to construct a three story building on the east side of the north branch of the Chicago River, next north of Blackhawk street, as indicated on the map sent herewith showing in yellow marking the proposed building and in red marking the dock line as originally established by Mr. Elston,

has been received by me, and in response to your request for an opinion as to the status of the subdivision dock line for the purpose of issuing said permit for the proposed work, I submit the following:

On October 11, 1855, Elston caused to be recorded in the recorder's office of Cook County a plat of his subdivision and showed on said plat the "dock line" as marked in red on the said enclosed plat. In reference to the proposed building, the distance on the north side of Blackhawk street, beginning at a point on the west side of Cherry street, is exactly 538 feet to the subdivision dock line which includes the south boundary of the contemplated structure; and beginning at the same starting point, 219 feet north of the north side of Blackhawk street, the distance to the subdivision dock line is 522 feet. The original records of Elston's subdivision have been destroyed by the Chicago fire, but copies thereof are in the possession of the Map Department of the City of Chicago and can also be found, as the subdivision existed prior to the fire, in the map books of The Chicago Title and Trust Company. Therefore, the dock line as established by Elston in his subdivision cannot be questioned.

It is true that the City Council of the City of Chicago has authority to establish a new dock line if it so desires, but after a careful search I find that there have been no ordinances establishing a new dock line along the property in question nor anything that might in any way affect same.

The right of the riparian owners to use the land between the subdivision dock line and the present dock line as shown on the plat is not contested, but on the contrary, they have the only right to use same except that use which the city may make of it, which latter use, however, cannot deprive the owners of their riparian rights. The general rule is that a riparian or shore owner has a right to build a *wharf* and a *pier* out to the line of navigation so long as it does not obstruct navigation nor interfere with the rights of adjoining owners.

Ensinger v. People, 47 Ill. 384.

Subdivision 30, Section 1, Article V of the Cities and Villages Act provides that the City Council has the power

to deepen, widen, dock, cover, wall, alter or change channel of water course.

The power of the city to widen the channel of the river when exercised solely in the interest of navigation can, ordinarily, *not be questioned by abutting owners*. In Illinois the owner of the land on the banks of the river also owns the bed of the stream to its center, subject only to the public right of navigation, but he cannot erect docks, piers or wharves beyond the point of navigability.

Chicago v. Laflin, 49 Ill. 172.

Washington Ice Co. v. Shortall, 101 Ill. 52.

Chicago v. Van Ingen, 152 Ill. 624.

Beidler v. Sanitary District, 211 Ill. 628.

Yates v. Milwaukee, 77 W. I. 497.

The case of *City of Chicago v. Van Ingen, supra*, is almost directly in point on the question involved herein. The property, described as "Fullerton's Addition," was platted and the dock line was shown to be several feet away from the thread of the north branch of the Chicago River. The court in effect said that by fair inference, at least, the subdivision of the land, only, into lots, blocks, streets, alleys and railroad right of way carried the area of lots platted to the river. The court talks at length as to the dedication of the river, but that contention is not necessarily involved in the case under consideration. Admitting that the bed of the river belongs to the adjoining owners, the question is, can they extend their rights beyond the dock line as established by the original owner, Mr. Elston. Although the case of *City of Chicago v. Van Ingen, supra*, was decided against the City of Chicago, the gist of the decision was that the city, after having issued a permit to build a dock in consideration of which the appellee conveyed some strips of land to the city, could not revoke the permit and deny the appellee the right to build the permitted dock. Clearly such permit was properly and lawfully issued and consequently could not be legitimately revoked. The court said:

"It therefore seems clear, that while the platted line might have been regarded, in a sense, as the lot line,

it was not so by reason of any express dedication of the land and water beyond it, but as only indicating the line of the river if improved and that the grantee, *until such time* owned to the center of the stream."

This obviously indicates that the city can compel the removal of the dock if it wishes so to do, providing, however, that it dredge and improve the river, and one of the reasons for the city's power of removal and improvement to the dock line without compensation is, that the adjoining owner is having his shore line improved, notwithstanding the fact that he is being deprived of a strip of land which is his by reason of accretion or otherwise. If a contrary conclusion be arrived at, where would our navigable rivers be?

After a careful investigation of the situation it cannot be definitely determined whether the subdivision dock line, as made by Elston in the year 1855, was along the thread of the river and that the land, which is now beyond that line, has been formed by natural accretions, or whether the strip of land in question existed at that time and that Elston dedicated same for river purpose. It is my opinion that it was the latter, but in any event it would not change the conclusion reached in this opinion.

Because of the fact that the riparian owner may build a dock or wharf to the thread of the river as appears from the decision of various cases in this state, it cannot be presumed that a building can be built to the thread, if the established dock line is not the thread of the river. Furthermore, the fact that the present and prior owners of the property in question have occupied the land beyond the subdivision dock line for a great many years has not the slightest effect on this case, for two distinct reasons: first, adverse possession of property belonging to the public (or municipality) cannot deprive the public of the title thereof; and second, the city could not prevent the use of the strip by the adjoining owners, and hence, where one cannot be sued, the statute of limitation does not run in his favor.

Therefore, the subdivision dock line, as shown in the plat, is the boundary of the land of the adjoining owners, beyond which no building should be permitted to be con-

structed. The owners may, however, use the strip of land between the said subdivision dock line and the river for dock purposes, but the city may at any time, if it so desires, take away the said strip or any part thereof *without compensation*, providing, however, it decides to dredge and widen the river.

The City Council has ample authority to change the dock line nearer to the thread of the river, but until such action is taken, the line is established. I might further suggest that the permit might be granted with a provision that the permit shall in no way tend to change or alter the subdivision dock line as shown and established on the plat in red, and in the event that the commissioner of public works deems it necessary or otherwise, to have the obstruction removed to the said dock line, that the party to whom the permit is granted will remove same upon a short notice, perhaps thirty days.

I am returning herewith your letter and the plat of Block 50 of Elston's Addition to Chicago.

Yours very truly,

HARRY F. CHAVERIAT,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

**Liability for Cost and Up-Keep of Inclined Approach to
18th Street Viaduct.**

April 6, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

Replying to your request for an opinion as to the liability of Carson, Pirie, Scott & Co., for the repair of the inclined approach landing from Lumber street to the 18th street viaduct, we beg to advise that since said incline is, as we understand, a part of 18th street, there is no reason why the Board of Local Improvements can not cause the same to be repaired or rebuilt, in the same manner as they make any

other local improvements. The cost of the improvement would probably be assessed against Carson, Pirie, Scott & Co., they being the only abutting property owners on that side of the street, and the party principally benefited by the improvement. Very likely, though, the board would find that property owners on the north side of 18th street would also be benefited and should pay a part of the cost of the improvement; and possibly they would likewise find that the improvement would be a benefit to the general public and that the city should pay a part of the cost thereof.

While it is apparent that this is a matter that would have to go through the hands of the Board of Local Improvements, we know of no reason why preliminary and tentative negotiations can not be made with Carson, Pirie, Scott & Co., in regard to the matter.

As to whether the city has the right to barricade this incline for an indefinite period, it is our opinion that, while the city unquestionably has the right to close and barricade a street, bridge or viaduct, or an approach thereto, which is out of repair, and may keep it closed for a reasonable time, particularly if the city has not, and is unable to obtain, the necessary funds wherewith to repair such street or structure, yet it is an elementary principle of law that a city is in duty bound to *keep in repair* all streets, bridges, viaducts, etc., accepted, laid out or built by it, and it can not therefore close the same for any unreasonable length of time without subjecting itself to liability for damages.

Carney v. Village of Marseilles, 136 Ill. 401.

Kreigh v. City of Chicago, 86 Ill. 407.

Elam v. Mt. Sterling, 20 L. R. A. (n. s.) 512.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Jurisdiction of City in Grant Park.

April 6, 1921.

HON. ULYSSES S. SCHWARTZ, Chairman, Committee on Local Transportation.

Dear Sir:

We are in receipt of your communication dated March 2, 1921, addressed to the corporation counsel, wherein you request this department to furnish the Commission on Municipal Garages with an opinion as to the jurisdiction of the City of Chicago and the South Park Commissioners in Grant Park; whether the South Park Commissioners have jurisdiction over the surface only, and whether the City of Chicago could construct garages under the surface of Grant Park. In reply, we beg to advise as follows:

In order to determine the respective jurisdictions of the City of Chicago and the South Park Commissioners in and to any proposed underground garages in Grant Park, it is essential to settle the respective titles and rights of said City of Chicago and said South Park Commissioners in and to Grant Park, and to trace the respective sources of title in each.

The rights of the City of Chicago in the area known generally as Grant Park have been adjudicated several times both by our State and Federal Courts.

In the original suit of the *People of the State of Illinois, ex rel. the Attorney General of said State, complainants, versus the Illinois Central Railroad Company, and the City of Chicago, defendants*, and the cross suit of the City of Chicago, complainant, against the Illinois Central Railroad Company, and The People of the State of Illinois, defendants—the Circuit Court of the United States for the Northern District of Illinois, on September 24, 1888, entered a decree, which on appeal was affirmed by the Supreme Court of the United States in 146 U. S. 387, and which held that the fee of all the public grounds in the City of Chicago lying east of Michigan avenue and between the north line of Randolph street extended to Lake Michigan and the north line of block 23,

extended to the lake, in fractional section fifteen addition to Chicago, including the grounds upon which rest the tracks and breakwater constructed by the Illinois Central Railroad Company, is in the City of Chicago in trust for public use.

Again, in the case of *United States v. Illinois Central* (154 U. S. 225), the Supreme Court discussed the question of the right of the United States to the lake front, and in so doing passed upon the question of title to such land. On page 234, the court said "The question involving the title and right of the parties embraced in the cases, considered under the general designation of the *Illinois Central Railroad Company v. State of Illinois*, to the navigable waters of the harbor of Chicago and in the Lake Front property, and the encroachments on the harbor by the railroad company, and the validity of the act of April 16, 1869, granting submerged lands in the harbor, were fully considered and settled as between the State and the City of Chicago, on the one part, and the Illinois Central Railroad Company on the other."

Again, on pages 241 and 242, the court says:

"It was also held in *Illinois Central Railroad v. Illinois*, that the ownership in fee of the streets, alleys, ways, commons, and other public ground on the east front of the city bordering upon Lake Michigan, in fractional section ten, was a good title, the reason assigned being that by the statute of Illinois the making, acknowledging and recording of plats operated to vest the title in the city in trust for the public uses to which the ground was applicable."

The history of the title of the City of Chicago to the lands in what is now known as Grant Park is given in the several well known cases wherein Montgomery Ward prevented the erection of buildings on said Grant Park.

See

City of Chicago v. Ward, 169 Ill. 392.

Bliss v. Ward, 198 Ill. 104.

Ward v. Field Museum, 242 Ill. 496.

All of the above cases are predicated on the proposition that the fee of the lands east of Michigan avenue between Randolph street and Park Row is in the City of Chicago.

Let us now consider the relation of the South Park Commissioners to and with Grant Park.

July 27, 1896, the city passed an ordinance giving consent to the South Park Commissioners to take, regulate, control and govern certain portions of the park. This was accepted by the park commissioners by a resolution adopted October 14, 1896. The Legislature passed an act approved June 11, 1897, reciting the passage of the ordinance and planned for a parade ground and armory. This was prevented in the case of *Bliss v. Ward, supra*. On April 24, 1899, the Legislature passed an act, reciting that the title to the land, was still in the state, and enacted that the park should be called Grant Park. In 1901, the above act was amended, and part thereof was conveyed to the South Park Commissioners. On May 14, 1903, the whole of Grant Park, bounded on the north by Randolph street, on the south by Park Row, on the east by the lake, was conveyed to the South Park Commissioners, to be held, managed and controlled by said commissioners as other parks then under their control.

The question, then, of the respective rights of the City of Chicago and the South Park Commissioners in and to garages built underneath the ground of Grant Park depends upon the respective titles of the City of Chicago and the South Park Commissioners. The Supreme Court of the United States in the *People of the State of Illinois ex. rel. Attorney General v. Illinois Central and City of Chicago*, decided that title in fee was in the City of Chicago. Therefore, it continued to remain in the city despite the acts of the Legislature until and unless the city divested itself of such title. That the city did this, we have been unable to find. Hence, the title to the city, being in fee, the city would own the surface of Grant Park, and also the land underneath said surface and as such owner could permit the building of underground garages. The jurisdiction of the park commissioners is confined to the managing and controlling of such land for park purposes, only. Therefore, unless such underground garages would interfere with such control and

use for park purposes, the South Park Board could not prevent the city from building such garages. Neither, do we think, could it insist on the management of said garages, as same was never contemplated in the grant of power and authority issued to the commissioners by either the Legislature or the City of Chicago, and the commissioners have no greater rights or authority than that expressly or impliedly granted them.

In conclusion, the undersigned is of the opinion that the city alone has the right to build underground garages in Grant Park because the title in fee to Grant Park is in the City of Chicago.

Yours very truly,

EMANUEL ELLER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Shutting Off Water for Non-Payment of Bill.

April 7, 1921.

MR. W. J. McCOURT, Superintendent of Water.

Dear Sir:

Your letter of January 12, 1921, to the corporation counsel, wherein you request an opinion as to the right of the superintendent of water to shut off water against certain premises for the non-payment of a bill submitted by the Bureau of Engineering to the consumer, through the Bureau of Water, for time and material in the repairing of water meters, etc., was referred to the undersigned.

The Bureau of Water and the Bureau of Engineering are two distinct and separate municipal departments. There is nothing in the city ordinances governing the control and management of the Water Bureau authorizing the shutting off of water for consumers because of non-payment of bills to departments other than the Bureau of Water.

Undoubtedly the repairs rendered by the Bureau of En-

gineering were necessary, and the sum charged therefor reasonable. Nevertheless, if the consumer disputes the reasonableness of the bill, or disclaims liability, the Bureau of Water cannot legally arbitrarily compel payment by shutting off water service. In the event of a dispute, which appears to be the case, the matter of an adjudication or adjustment would be for the courts to determine.

Very truly yours,

ALFRED O. ERICKSON,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Inspection of Tunnels Constructed Under Authority of the Sanitary District.

April 9, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

In reply to your request for an opinion as to the authority of the City of Chicago to inspect a certain tunnel, constructed, within the limits of the city, under and by virtue of the authority of The Sanitary District of Chicago, we beg to state, that, if it is a fact, as we understand it to be, that the Sanitary District has not itself made any provision for the inspection of the work of constructing said tunnel, it cannot, in our opinion, prevent the City of Chicago from doing so, nor from charging a reasonable fee for such services.

In making such inspections, as well as in the exercise of police power generally, the city is performing, not a *municipal*, but a *state* function. In other words, it is acting merely as the *agent of the state*, just as it does, for instance, when it causes its police officers to arrest thieves, murderers and other violators of *state laws*, although they may have been guilty of no violation of any *city ordinance*.

Culver v. City of Streator, 130 Ill. 238.

People v. Harper, 91 Ill. 357.

City of Chicago v. Wright, 69 Ill. 318.

Harmon v. City of Chicago, 110 Ill. 400.

City of Chicago v. Williams, 182 Ill. 135.

Johnston v. City of Chicago, 258 Ill. 494.

Dillon on Mun. Corp. (5th ed.), Sec. 103.

The state has the right to appoint whatever agents it desires for this purpose, and the mere fact that a corporation is a municipal corporation, neither gives it any inherent right to exercise police power, nor does it exempt it from the inspection laws or other police regulations authorized by the state, for a municipal corporation is not a *sovereign entity*, but is in many respects similar to any other corporation.

That the City of Chicago has received from the state broad police powers, and is authorized to make inspections of the kind here under consideration, we do not understand to be disputed. Work done by the Sanitary District within the limits of the City of Chicago, is nowhere expressly exempted by the statute from inspection by the city, and it cannot be said to be impliedly exempted unless it can be shown:

1. That the Sanitary District has been invested by the state with authority to perform such inspection itself;
and
2. That it is actually exercising such authority.

If the Sanitary District either has not the required authority, or is not exercising the same, there is not, in our opinion, anything to prevent some other agent of the state, such as for instance the City of Chicago, to act for the state in this regard.

We deem it unnecessary here to discuss the extent of the police power possessed by the Sanitary District, further than to say that there may well be a question whether it is as broad as that possessed by the City of Chicago, for the Sanitary District was organized for a much more limited purpose than was the city. The statute gives it all powers *necessary* for the accomplishment of the purpose for which it was organized. But how far this would authorize the Sani-

tary District to practically duplicate the government of the city, might be a disputed question.

In *Sanitary District of Chicago v. C. & A. R. R. Co.*, 267 Ill. 252, the Supreme Court said:

“It is a general proposition of law that a municipal corporation possesses and can exercise only those powers that are granted to it in express words or are necessarily or fairly implied in the powers expressly granted and essential to the accomplishment of the declared objects and purposes of the corporation (1 Dillon on Mun. Corp., 5th ed., Sec. 237). What police powers a local corporation or municipality may exercise, and the manner in which they are to be enforced, will depend upon its charter, or legislative acts applicable thereto, and the general policy of the state with respect to the same. It can only exercise such powers as are fairly included in its charter grants. (3 McQuillin on Mun. Corp., Sec. 894; *Judy v. Lashley*, 50 W. Va. 628.)”

But assuming that the Sanitary District is just as much an agent of the state for the exercise of its police power as the city is, and has just as broad powers in that regard, it cannot displace the city in any case unless it at least exercises the power itself. It cannot, in effect say, in regard to public works under its authority: “We will neither inspect them ourselves nor permit the City of Chicago to inspect them.” That would be showing palpable disrespect to the state, which has appointed the City of Chicago as one of its agents for such purposes.

In regard to fees for such inspections, our Supreme Court has repeatedly held that the right to make an inspection, under the police power, carries with it the power to collect from the party benefited by such inspection a reasonable fee for the services rendered.

People v. Harper, 91 Ill. 357.

C. W. & V. Coal Co. v. People, 181 Ill. 270.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Approval of Plans of Surface Lines.

April 11, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

In reply to your request for an opinion relative to whether in the matter of the reconstruction of the various viaducts by the Union Station Co., it is necessary for the commissioner of public works to approve the plans of the Chicago Surface Lines for the reconstruction of their tracks, we wish to say, that the Union Station Ordinance, of March 23, 1914, is a contract solely between the City of Chicago and the Union Station Co., and makes no provision for the approval by the commissioner of any plans except those presented by the Union Station Company. The last named company is made solely responsible for the execution of the work. The ordinance does provide, as concession to convenience that "any public utility corporation acting under a permit or ordinance grant from the City of Chicago," shall where its tracks are involved, have the "permission, right and privilege" to perform the actual work necessary, to the reconstruction of tracks or changes in grade, but they are not *required* to do so, nor is anything said about the presentation by them of any plans therefor. On the other hand, the ordinance does specifically provide that the Union Station Company shall present to the commissioner of public works, for his approval, general plans, for the entire reconstruction of the streets, and do the work under his direction.

Whenever the ordinance speaks about the reconstruction of sidewalks, roadbeds, pavements, etc., to be done by the Union Station Co., it very carefully specifies that such work is to be done under the supervision, and to the satisfaction of, the commissioner of public works. That it says nothing whatever about any supervision or approval by the commissioner of public works when it speaks of the reconstruction of street car tracks, clearly indicates to our mind two things:

- 1.) That the ordinance contemplates no general reconstruction of the street car tracks, but merely raising

them to a new level, as the street is raised, and relaying them there in the same way as they were before.

2.) That the ordinance does not consider this an important enough alteration to require a special plan or permit, but regards it as merely a minor detail, which is fully covered by the provisions for general plans to be presented by the Union Station Company and carried out by them under the direction of the commissioner of public works.

There is a further objection to the city passing upon the street car company's plans. The street car company is no longer "*acting under a permit or ordinance grant from the City of Chicago*" (all its rights in that regard having recently been by the City Council declared forfeited), and it therefore has not even the "privilege" otherwise reserved to it under the ordinance to do the actual work, if it should desire. Even if it did, however, that would be a matter solely between it and the Union Station Company, for the ordinance of March 23, 1914, was a contract solely between the City of Chicago and the Union Station Company. While the city required the Union Station Company to allow certain privileges to the street car companies, it did not itself assume any duties towards them. That appears from the very title of the ordinance, which reads:

"*An Ordinance granting to the Union Station Company, a corporation, its successors and assigns, the right to construct, maintain and operate a railroad passenger station in the City of Chicago, and the right also to construct, maintain and operate certain railroad tracks and facilities in connection therewith in this ordinance described.*"

For your convenience we append hereto a copy of all the provisions in said ordinance which have any reference to reconstruction of street railway tracks.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Boston Store Obstructions.

April 11, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

Your communication with reference to the obstructions caused by the Boston Store in keeping the trap doors of the freight elevators in the sidewalk area on Dearborn street open and placing merchandise on the walk, and in the maintaining of steel and glass showcases on the sidewalk space in Dearborn and Madison streets, has been referred to me.

The entire subject is unequivocally covered by several ordinances passed and amended at different times by the City Council of the City of Chicago. Although each one of the two objections enumerated herein is separate and distinct from the other, they will, for the purpose of clarity, be considered in this opinion together.

The general rule is that the right of the public to use the streets and sidewalks for purposes of travel and transportation is the paramount one and that of the abutter to occupy them for other purposes is a permissive and subordinate one.

28 Cyc., 859;

Brauer v. Balt. Refr. Co., 66 L. R. A. 403.

Under this rule it has been uniformly held that while abutting owners may use the street and sidewalk in any manner not inconsistent with the right of the public, they cannot so use it as to interfere with the convenience of the public.

Cincinnati v. White, 6 Peters (U. S.) 431.

Chapter 66, Section 2320 of The Chicago Code of 1911, provides in effect that any person while receiving or delivering goods, wares or merchandise to or from the premises abutting a sidewalk shall allow said merchandise to remain there only a *reasonable* time and for the purpose thereof he shall not occupy over *four feet* of the outer edge, and that a violation of said section will subject the violator to a fine of not less than five nor more than ten dollars for *each* such offense. Section 2321, which has the same penalty clause, similarly provides against the obstruction of the sidewalk for a longer

time than is actually necessary to remove same. By a reasonable time the ordinance does not mean all day, and when a business has increased to such an extent that it must make use of the sidewalk, the cases have universally held that the business should go to larger quarters and not obstruct the street and sidewalk at the expense of the public. Reference is also made to Section 2331 as amended March 24, 1913 (page 4241 of Council Proceedings of March 24, 1913) and May 26, 1913 (page 575 of Council Proceedings of May 26, 1913), which section took effect on June 26, 1913, and reads as follows:

“Section 2331. Openings uncovered.) It shall be unlawful for any person, firm or corporation owning or using any coal hole, sidewalk lift, * * * or other opening in any public sidewalk, to allow the same to remain uncovered or open, except while the same is actually being used for the purpose of entrance or exit, or for the purpose of introducing or removing any article through such opening, and it shall be unlawful to use a sidewalk lift, or trap door, between the hours of 7:30 o’clock A. M. and 9 o’clock A. M., 11:30 o’clock A. M. and 1:30 o’clock P. M., and 5 o’clock P. M. and 7:00 o’clock P. M.”

Whenever there is a violation of any one or all of the aforesaid ordinances, the power to terminate it is found in Section 2336 of the same chapter of The Chicago Code of 1911 as hereinbefore mentioned, which section is as follows:

“It shall be the duty of the general superintendent of police to see to the enforcement of each and all of the provisions of this chapter (said chapter includes Sections 2320, 2321 and 2331), and each and every policeman shall, whenever there is any obstruction in any street or alley or *sidewalk*, endeavor to remove the same; and, in case such obstruction shall be of such character that the same cannot readily be removed, then such policeman shall report the same to the Department of Public Works, and the said department shall remove the same.”

In the latter section it clearly appears that the commissioner of public works has the power to remove same if the article is of such nature that the policeman cannot easily move same. That an officer is unable to move the showcases

under consideration is beyond doubt, but the section of the Code last mentioned merely indicates that not only are the movable articles intended to be removed, but also the articles that are attached or fastened to the building, providing, however, they are on, or extend over, the sidewalk. It also appears from a careful investigation of the aforesaid section of the ordinances that no written notices, as were given to the Boston Store in the case at hand, are required, but merely an oral notification by an officer is sufficient.

In Chapter 73, Section 2434, it is provided that the commissioner of public works is authorized to order any article or thing *whatsoever* which may encumber or obstruct any street, alley, etc., to be removed, and unless it is removed within six hours after notice, to remove same, and the owner of any article so removed shall be subject to a penalty in addition to cost of such removal. The word "sidewalk" does not appear anywhere in this section, but a fair construction thereof would undoubtedly include sidewalks.

Drew v. Geneva, 150 Ind. 662;

Tabor v. Grafsmith, 109 Ind. 206;

Knapp v. St. Louis Trans. R. R. Co., 126 Mo. 26.

On March 10, 1913, the following order was passed, to-wit:

"That the commissioner of public works be and is hereby directed to notify all persons and corporations that maintain obstructions or encroachments upon *public sidewalks* within the loop district, that such obstructions must be removed before January 1, 1915, or the same will be removed by the commissioner of public works, as provided in The Chicago Code of 1911 (refers to Section 2336)." Council Proceedings of March 10, 1913, page 4011.

To the same effect see page 3630 of Council Proceedings had on Feb. 15, 1915, which contains substantially the same provisions as the previous order, and reads in part as follows:

"* * * bounded on the east by Lake Michigan, on the north by the north line of Chicago avenue, on the west by the west line of Halsted street and on the south by the south line of 22nd street, that such obstructions must be removed before June 1, 1917, or the same will be removed by the commissioner of public works. * * *"

Finally, reference is made to Section 2470 of The Chicago Code of 1911, as amended March 22, 1915 (page 4069 of Proceedings had on same date) which is as follows:

“It shall be unlawful for any person, firm or corporation to erect, place or maintain in or upon any street, alley, *sidewalk* or other public place in the City of Chicago, any fruit stand, lunch stand, lunch wagon, flower stand, bulletin board, trough for feeding horses, or any table, box, bin, rack, *showcase*, platform, or any other arrangement or structure for the *display* or sale of goods, wares or merchandise, or for the pursuit of any occupation whatsoever, unless a permit for same shall be obtained from the commissioner of public works. *Provided: That the Commissioner of Public Works shall not grant such permit, except for the purpose of exhibiting for sale daily newspapers, to be effective within the district bounded on the north by the Chicago River, on the south by the north side of Van Buren street, on the east by Lake Michigan and on the west by the Chicago River.*”

From the various ordinances hereinbefore mentioned and cited it is clear that the Boston Store is violating the right of the public by having the show cases extend over the sidewalks, and, in view of the fact that two notices have already been served on said violator, the obstructions may be removed at once by the commissioner of public works, in whom the power is vested, and the cost of such removal should be charged to the Boston Store. And, unless the Boston Store has a permit to use the sidewalk for their elevators, subject, however, to Section 2331 of The Chicago Code, the same consequences apply. In the event that a permit has been granted and the violation thereof cannot be prevented by police supervision, then it is suggested that the commissioner of public works cancel the permit and remove, or cause to be removed, all goods, wares and merchandise that may be placed on the sidewalk and forbid the use of the elevators, being in violation of Section 2320 above.

Yours very truly,

HARRY F. CHAVERIAT,

Approved: *Assistant Corporation Counsel.*

SAMUEL A. ETTTELSON,

Corporation Counsel.

**Claim for Demurrage on Account of Steamer being Held Up
at Bridge.**

April 11, 1921.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Replying to your request for an opinion relative to the liability of the City of Chicago to K. A. Scott & Company for demurrage charges on account of the delay caused to the steamer "Lupus" at Wells street bridge, on August 26th and 27th last year, we beg to state that, in our opinion, there is no liability on the part of the city, for the reasons hereinafter stated.

There is not, as we understand it, any contention that there was any special negligence on the part of any employe of the city on the occasion in question. The claim is filed, apparently, on the theory that the city is an absolute *insurer* against delays to river traffic occasioned by the operation of its bridges. But in our opinion, this theory has no foundation in law.

In the case of *Escanaba Transportation Company v. City of Chicago*, 107 U. S. 678, the Supreme Court of the United States held that the City of Chicago had full authority to construct and operate bridges over the Chicago River, even though it might at times cause considerable inconvenience and delay to the river traffic. The main contention of the company in that case was that the right of commerce by vessel was *paramount* to the rights of the public using the bridge. But the Supreme Court expressly denied that principle.

The same rule was recognized in *Hamilton v. Vicksburg, etc., Railroad Co.*, 119 U. S. 280; *Illinois River Packet Co. v. Peoria Bridge Association*, 38 Ill. 467; *City of Chicago v. McGinn*, 51 Ill. 266.

From these decisions, it follows that the rights and obligations of the city in regard to bridges over the river, are precisely the same as those it has in regard to streets and bridges, generally. Indeed, it was expressly so held in the case of *Lehigh Valley Transportation Company v. City of Chicago*, 237 Ill. 581.

In regard to streets and bridges generally, the city is not an *insurer* of the absolutely perfect condition of the same. (*City of Mt. Carmel v. Guthridge*, 52 Ill. 632; *City of Chicago v. Watson*, 6 Ill. App. 344). All that it is required to do is to use *reasonable care* to keep the same in a reasonably good condition, and, if they should get out of repair, to use *reasonable diligence* in repairing the same as soon as it has *notice* of the defect. In regard to bridges and other structures, "reasonable care" will no doubt be held to include *reasonable inspection* to prevent the structure from getting out of repair unnecessarily. But when the city has done that, it has fulfilled its duty, and cannot be held liable for any accidents that may happen through no fault of its own.

City of Chicago v. McGiven, 78 Ill. 347.

Gavin v. City of Chicago, 97 Ill. 66.

Elam v. City of Mt. Sterling, 20 L. R. A. (N. S.) 512.

In the *Gavin* case, *supra*, the Supreme Court said:

"Undoubtedly it is the duty of a municipal corporation to keep and maintain such bridges within the corporate limits in a *reasonably* safe condition. When it has done that it has discharged its duty to the public in that respect. * * * It is not understood to be the duty of such a corporation to so construct its streets and bridges that accidents are *impossible* to persons using them."

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Delay to Steamer "W. J. Connors."

April 11, 1921.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

In reply to your request for an opinion relative to the liability of the city on account of delay to steamer "W. J.

Connors," on November 14, 1920, when the Franklin-Orleans street bridge failed to operate on account of a grounded electric wire, we beg to state, that since there appears to be nothing in the facts presented showing any negligence on the part of any agent or employe of the city, we are of the opinion that the city is not liable for this claim or any part thereof.

The principle governing a claim of this nature is precisely the same as that governing a temporary obstruction of a street, for the bridge is merely a part of the streets it connects.

City of Chicago v. Powers, 42 Ill. 169.

Gavin v. City of Chicago, 97 Ill. 66.

While it is true that the Federal Government exercises control over navigation in the river, yet the Supreme Court of the United States has repeatedly held (in the case of *Escanaba Transportation Co. v. City of Chicago*, 107 U. S. 678, and many subsequent cases) that the Federal Government has never undertaken to forbid the City of Chicago to build, maintain and operate bridges across the river; that the commerce in the river has *no paramount rights* over the traffic across the bridges; that the volume of the latter is probably as great, or greater, than the former; that bridges are therefore a great public necessity; that even though navigation may thereby at times suffer considerable delay and other inconvenience, yet, so long as the delay is not caused by any unlawful negligence on the part of the city or its agents, those engaged in river navigation have no more cause for complaint thereby than those using the bridge have when they are delayed by the opening of the bridges for the passage of boats; that each class must yield a little for the accommodation of the other.

Other cases to the same effect are:

Hamilton v. Vicksburg, etc., R. Co., 119 U. S. 280.

Tempel v. United States, 248 U. S. 121.

Illinois River Packet Co. v. Peoria Bridge Association, 38 Ill. 467.

City of Chicago v. McGinn, 51 Ill. 266.

People v. Metropolitan Ry. Co., 285 Ill. 246, 258.

That the liability of the city in regard to bridges is precisely the same as in regard to streets was expressly held by our Supreme Court in the case of *Lehigh Valley Transportation Co. v. City of Chicago*, 237 Ill. 581.

Applying then the same rules which govern streets and bridges in general, there can be no liability unless it can be shown that the accident causing the delay was due to a lack of ordinary care on the part of the city in keeping the bridge in a reasonable state of repair. That, we understand, is not even contended.

The city is not an *insurer* of the safety and perfect state of repair of its streets and bridges. It is only required to use *reasonable* care to maintain them in a *reasonable* state of repair, and, in case they do get out of repair, to use *reasonable diligence* in repairing them as soon as it has notice of the defect. When it has done that, it has fulfilled its duty, and is not liable for any accidents which occur without its fault. In the case of *City of Chicago v. Watson*, 6 Ill. App. 344, Judge McAllister, in delivering the opinion of the court, said:

“The law does not regard the corporate duties of the City of Chicago as placing the corporation in the position of *insurer* against accident to individuals upon its streets and sidewalks, or require *any absolute degree of perfection* in respect thereto. Hence it follows that it is not liable for every defect therein, though such defect may be the cause of the injury sued for. In the absence of any acts of *positive misfeasance* on the part of the corporation, its officers, servants, or others acting under its authority, within the scope of its powers, it is responsible only for the exercise of *reasonable diligence* in keeping its streets and sidewalks in a *reasonably safe* condition for travel in the ordinary modes, by night as well as by day, by any person in the exercise of reasonable or ordinary care to avoid accidents.”

In the case of *City of Chicago v. Gavin*, 97 Ill. 66, the Supreme Court said:

“Undoubtedly it is the duty of a municipal corporation to keep and maintain such bridges within the corporate limits in a reasonably safe condition. When it has done that it has discharged its duty to the public in that respect. * * * It is not understood to be the duty

of such a corporation to so construct its streets and bridges that accidents are *impossible* to persons using them. That would impose upon them a higher degree of care in this regard than the public welfare demands."

In view of the above authorities, we are of the opinion that the city is not liable for the claim in question.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Y. W. C. A. Exemption from Water Rates.

April 13, 1921.

HON. W. J. McCOURT, Superintendent of Water.

Dear Sir:

We have your request for an opinion from the corporation counsel as to whether the Young Women's Christian Association are entitled to exemption from water rates at their Central Branch, No. 59 East Monroe street, located on leased premises, of which they do not own the fee.

Section 2755 of The Chicago Code of 1911 provides as follows:

"2755. *Exemptions—charitable, municipal, religious and educational institutions, and armories.*) The commissioner of public works shall remit and cancel all water rates and charges heretofore levied and assessed or which may be hereafter levied and assessed against such property of any charitable, municipal, religious or educational institution in the city as is used in the immediate conduct or carrying on of the charitable, municipal, religious or educational purposes of such institution and which is not used for gain or profit, or rented, conducted, maintained or operated for the purpose of producing revenue for such institution; or which have been heretofore or may hereafter be levied and assessed against any armory of the National Guard."

It will be observed that this ordinance makes no distinction as to whether the property is owned in fee or not. It

merely stipulates that it must be “*used*” exclusively for charitable, municipal, religious or educational purposes.

We assume that it is not questioned that the Y. W. C. A. is a charitable institution and that the property in question (or, at any rate, that portion for which exemption from water rates is sought) is used exclusively for charitable purposes, and we wish it to be clearly understood that we are predicating this opinion on that assumption. That being the case, we can not see that it makes any difference, in principle, whether the association owns the fee or not, for our Supreme Court has repeatedly held that a water rate is not a *tax*, to be levied against the fee of the land, but simply a charge against the users of water, for services rendered. So far as water rates are concerned, therefore, it is not a matter of much importance who owns the fee.

In *Wagner v. City of Rock Island*, 146 Ill. 139, our Supreme Court said:

“Taxes are the enforced proportional contribution from persons and property, levied by the state by virtue of its sovereignty, for the support of government, and for all public needs, and they are therefore justly and properly subjected to the rule of uniformity. But water rates are imposed and collected merely as the compensation or equivalent to be paid by those who choose to receive and use the water, for the commodity thus furnished them by the city. No one is compelled to receive or use the water so as to be under obligation to pay for it, except at his own election.”

Other cases to the same effect are:

Village of Lemont v. Jenks, 197 Ill. 363.

City of Chicago v. N. W. Mut. L. Ins. Co., 218 Ill. 40.

People v. Schlitz Brewing Co., 261 Ill. 22.

In each of three cases last cited, the municipality tried to charge the water rates against the owner of the fee, but the Supreme Court denied the right to do so.

It being conceded, therefore, that the Y. W. C. A. is a charitable institution, and it being the law that water rates do not constitute a tax against the fee of the premises, but merely a charge against the occupant thereof for services

rendered, we are of the opinion that the association is entitled, under the ordinance in question, to the exemption requested.

Yours very truly,
 CARL J. APPELL,
Assistant Corporation Counsel.

Approved:
 JAMES W. BREEN,
Acting Corporation Counsel.

Liability of Board of Education for Fees for Inspection of Weights and Measures.

April 15, 1921.

HON. WILLIAM STOCKER, Inspector of Weights and Measures.
 Dear Sir:

Replying to your request for an opinion from the corporation counsel as to whether the Board of Education is liable for fees for the inspection of weights and measures, it is our opinion that this depends upon whether the scales are used for commercial purposes or are merely kept for the private use of the schools. In the former case, the city has, in our opinion, the right to inspect the scales, under its general police power to prevent fraud, etc., but in the latter case we believe it would be outside the jurisdiction of the city government.

The Board of Education is not, technically, a part of the city government, but is a *separate corporation*. Section 128 of Chapter 122, Hurd's Statutes, reads as follows:

"Each city having a population exceeding 100,000 inhabitants shall constitute one school district which shall maintain a thorough and efficient system of free schools, which shall be under the charge of a *board of education*, which shall be a *body politic and corporate*, by the name of 'Board of Education of the City of'"

The statute provides that the members of the Board of Education shall be appointed by the mayor, with the approval of the City Council, but after they are once appointed, they

constitute an independent body, not subject to the control of the city government.

People v. Healy, 231 Ill. 629.

The mere fact that the Board of Education is a separate corporation, however, does not exempt it from the *police power* which the city exercises as an *agent of the state*, and which includes the authority to make reasonable inspections for the prevention of fraud and other matters affecting health, safety or morals, where these matters have not been taken care of by any other state agency.

City of Chicago v. Wright, 69 Ill. 318.

Culver v. City of Streator, 130 Ill. 238.

City of Chicago v. Williams, 182 Ill. 135.

Johnston v. City of Chicago, 258 Ill. 494.

It is questionable whether the city, in thus taking steps for the prevention of fraud, would have any power to demand the inspection of scales and measures not used for any commercial purposes. But if there were otherwise any doubt on the question, the ordinance has eliminated it by providing for obligatory inspection only in cases where the weights and measures are used commercially. Section 2842 of The Chicago Code of 1911, reads as follows:

“Every person using weights, measures, scale beams, patent balances, steel yards or any instrument, in weighing or measuring any article *intended to be purchased or sold* in the city, or any article weighed or measured for shipping or receiving purposes, or in weighing or measuring any person or animal, *for hire or reward*, shall cause the same to be inspected and sealed by the inspector of weights and measures in accordance with the provisions of this chapter.”

It follows from the above principles that unless the scales used by the Board of Education are used for commercial purposes, they are not subject to inspection by the city, except upon request by the Board of Education.

If the Board of Education has, in any case, requested inspection of their scales, or if they are used for such purposes as to render them subject to inspection without special

request, the Board of Education would, in our opinion, clearly be liable for the inspection fees, for our Supreme Court has repeatedly held that the right to make an inspection, carries with it the power to collect, from the party benefited by such inspection, a reasonable fee for the services rendered.

People v. Harper, 91 Ill. 357.

C. W. & V. Coal Co. v. People, 181 Ill. 270.

The case referred to by the attorney for the Board of Education, was a case in a local court, which was decided upon the particular facts in that case, and was never carried up to the Appellate or Supreme Court, wherefore we do not regard it of any importance whatever.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Permit to American Steel & Wire Co. to Erect Plank Barricade from South End of their Building to Dock.

April 19, 1921.

HON. JAMES J. McCOMB, Harbor Master.

Dear Sir:

We return herewith, approved as to form, permit to American Steel & Wire Co., to erect a plank barricade from the south end of their building, on Randolph street, to the dock line. The permit, no doubt, has long since become useless,—indeed, we note from the correspondence that the company long ago took the position that they did not want any permit, but claimed the right to go ahead without one, and demanded that you return the fee they had already paid for such permit. But, on account of the principle involved, we understand you desire an opinion as to the right of your department to require the taking out of permits in cases of this nature, and incidentally, we presume, your right to retain the fee already paid in.

There is not, in our opinion, any doubt of the right of your department to demand the taking out of a permit before any work of this nature can be done. Section 1127 of The Code of 1911 reads in part:

“Any person desiring to drive or place any pile or piles, stone or timber, earth or other obstruction, or build, construct or repair any dock, in the harbor, or to build any bridge or other structure across the Chicago River or any of its branches, or across the Calumet River, or to drive or place any pile or piles or make any excavations for the purpose of furnishing or laying foundations for any building or structure, within forty feet of the harbor, shall make application in writing for permission so to do from the commissioner of public works furnishing with such application a sketch or plat showing the nature of the work desired to be done, and upon such application being made and such sketch or plat being furnished as herein required, the commissioner of public works shall issue the permit desired, unless it shall appear that the work desired to be done will result in unduly obstructing the harbor or in endangering the safety of any dock, pier, breakwater or other structure located upon or along the harbor.”

The purpose of this ordinance is perfectly obvious. It is a precautionary measure to prevent any encroachment upon the river or harbor. To that end the Department of Public Works is not obliged to wait until encroachments have actually taken place, but is given the power to *prevent them beforehand* by regulating by means of permits the erection of any structure within 40 feet of the river. Nor do we doubt that a barricade of the kind in question is at least a “structure,” if not a “building.” It is spoken of in some of the letters as a “fence,” but even a fence is technically a “building,” *i. e.*, something built.

Century Dictionary, “Building.”

Wright v. Evans, 2 Abb. Pr. (N. S.) 308.

Livingston v. Ten Broeck, 16 Johns. 14.

We note that the company claims the right to build this barricade without a permit because of the fact that the Superior Court of Cook County, in the case of *Morton v. City of Chicago*, Case No. 228559, involving this property, held

that the city had, by 50 years of non-user, lost its rights to the wharf there, and accordingly the court issued an injunction restraining the city from asserting any claim to such wharf. The company seems to interpret this decree to mean that they have the right to build anything they please on the lot, without the need of any permit from the city. Such interpretation of the decree is, in our opinion, too absurd for serious consideration. If it were correct, then *nobody* would need to take out any building permits. For every person who takes out a building permit is supposed to own the lot on which the building is to be built. At least he occupies, for the time being, the position of owner. But manifestly that does not authorize him to build as he pleases without a permit from, and unregulated by, the city. So, in the present case, the fact that the city was enjoined from asserting any *title* to the lot, does not prevent it from asserting its police power and regulating the manner of building on the same, nor from taking precautionary steps to protect the harbor, to which its rights are unimpaired.

We are of the opinion, therefore, that your department properly required a permit in this case, and that, as you never refused to issue the same, the company was not entitled to demand the return of the fee paid therefor.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Substructure Contract for Madison Street Bridge.

April 22, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

Replying to your request for an opinion as to your authority to make final payment to FitzSimons & Connell Dredge & Dock Company for the substructure on the Madison

street bridge, they having completed their work except as to the riveting of the superstructure on to the same, which latter work is to be done by the contractor for the superstructure, although formally included in the contract for the substructure, we beg to state:

We have not a copy of the contract between the city and the company before us, but having been informed that it is in the usual form, we assume that it contains a provision that 15 per cent of the amount due shall be retained by the city until the final completion and acceptance of the work.

The law provides that contracts of this nature, when in excess of \$500, must be let to the lowest responsible bidder, after due advertising for bids. And after the contract has been let, the law will not permit any departure from its terms, or the payment of money before due thereunder, as this would not only be unfair to other bidders but would also release the surety on the contractor's bond.

Pells v. City of Paxton, 176 Ill. 318.

L. S. & M. S. Ry. Co. v. Chicago, 144 Ill. 391.

Little v. Jayne, 124 Ill. 123.

City of Chicago v. Agnew, 264 Ill. 288.

Section 91 of the Local Improvement Act reads as follows:

“Section 91. *Payment as Work Progresses.* From time to time, as the work under any contract for such improvement progresses, upon certificates by the said Board of Local Improvements, or by some officer designated by such board for that purpose, payments may be made either in money, vouchers or bonds, as herein provided, to apply upon such contract price, *reserving, however, a sufficient amount upon each of said payments to properly secure, in the judgment of said board, the faithful performance of the said contract, said reserve to be paid over at such time, and on such conditions as the board shall fix, after the said work has been completed or accepted.*”

Under the above statute and the decisions above referred to, final payment can not, in our opinion, be made until the work is completed.

Whether the work is completed, is, however, largely a

question of *fact*. And, in this case, the commissioner of public works is the final authority to decide whether the work is completed or not. If he regards it as completed, and is willing to assume the responsibility of so deciding, he may issue a certificate to that effect. But if he thinks that any doubts might arise as to that fact, we would advise him to protect himself, by bond or otherwise, against personal liability in case it should develop that his action was unwarranted.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Authority of City over the Chicago River.

April 23, 1921.

HON. JAMES J. McCOMB, Harbor Master.

Dear Sir:

We have received several requests from you for opinions relative to the authority of the city over the Chicago River. As these requests all involve essentially the same questions, we shall endeavor to answer them together.

In the first place, the authority over navigable rivers within the state belonged originally to the State of Illinois.

The Federal Government may, however, if it chooses, assume control over any navigable waters used in interstate commerce. But only in so far as it assumes exclusive control, or makes regulations inconsistent with those of the state does it supersede the state.

Cummings v. Chicago, 188 U. S. 410.

Any power that the state has in that regard, it may delegate to the City of Chicago. But it may also resume the power at any time, or delegate it to some other body, either wholly or in part.

By the Cities and Villages Act, as well as by prior acts, the state Legislature delegated to the City of Chicago complete

authority and control over the Chicago River. The Cities and Villages Act gives the City Council power:

“30—To deepen, widen, dock, cover, wall, alter or change channel of water courses.

“31—To construct and keep in repair canals and slips for the accommodation of commerce.

“32—To erect and keep in repair public landing places, wharves, docks and levees. * * *

“39—To appoint harbor masters and define their duties.

“40—To provide for the cleansing and purification of waters, water-courses, and canals, and the draining or filling of ponds on private property, whenever necessary to prevent or abate nuisances.”

In 1899 the Congress of the United States, however, passed the so-called River and Harbor Act, which superseded prior legislation on the subject, and of which Section 10 reads as follows:

“That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structure in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the chief of engineers and authorized by the secretary of war; and it shall not be lawful to excavate or fill, or in any way to alter or modify the course, location, condition or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the chief of engineers and authorized by the secretary of war prior to beginning the same.”

The question presently arose whether this act was to be construed as placing the complete control of rivers and harbors in the hands of the government of the United States and taking it out of the hands of the states. But the Supreme Court of the United States ruled otherwise.

The question was first determined in the case of *Cummings v. Chicago*, 188 U. S. 410. In that case Cummings and others had obtained a permit from the secretary of war to build a dock in front of their property along the Calumet River and were proceeding to build such dock when they were stopped from doing so by the City of Chicago on the ground that they had not obtained any permit from the Department of Public Works, as the city ordinances required. The Supreme Court, in sustaining the contentions of the city, said:

“In a sense, but only a limited sense, the United States has taken possession of the Calumet River, by improving it, by causing it to be surveyed, and by establishing lines beyond which no dock or other structure shall be erected in the river without the approval or consent of the secretary of war, to whom has been committed the determination of such questions. But Congress has not passed any act under which parties, having simply the consent of the secretary, may erect structures in Calumet River without reference to the wishes of the State of Illinois on the subject. We say the State of Illinois, because it must be assumed, under the allegations of the bill, that the ordinances of the City of Chicago making the approval of the Department of Public Works a condition precedent to the right of any one to erect structures in navigable waters within its limits, are consistent with the constitution and laws of that state and were passed under authority conferred on the city by the state.

“Calumet River, it must be remembered, is entirely within the limits of Illinois, *and the authority of the state over it is plenary*, subject only to such action as Congress may take in execution of its power under the Constitution to regulate commerce among the several states. That authority has been exercised by the state ever since it was admitted into the Union. * * *

“The effect of the Act of 1899, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a state, depend upon the *concurrent or joint assent of both the National and the State Governments*. The secretary of war acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure can not be erected by them. But under existing legislation they must, before proceeding under such authority, obtain also the assent of the

state acting by its constituted agencies.’’

Other cases to the same effect are:

Montgomery v. Portland, 190 U. S. 89.

Manigault v. Springs, 199 U. S. 473.

North Shore Boom Co. v. Nicomen Boom Co., 212 U. S. 406.

Gring v. Ives, 222 U. S. 365.

Simpson v. Shepard, 230 U. S. 352.

In 1911 the Legislature of the State of Illinois, created a Rivers and Lakes Commission and entrusted them with the power, among other things, to guard rivers and other public waters from encroachments. Their powers and duties in that regard were afterwards by the Civil Administration Act transferred to the State *Department of Public Works and Buildings*.

That the state had full authority to create such a commission and confer such duties upon the same, is unquestionable. We now have, therefore, three bodies charged with the supervision, regulation and protection of the Chicago River: (1) The Bureau of Rivers and Harbors of the City of Chicago; (2) The Department of Public Works and Buildings of the State of Illinois; and (3) The War Department of the United States. *No work tending to encroach upon, or otherwise affecting the Chicago or Calumet Rivers can be done without a permit from each of these three bodies.*

Answering your question as to the validity of the ordinance of June 11, 1869, we are of the opinion that said ordinance is perfectly valid, and a lawful exercise by the city of the powers theretofore conferred upon it by the state. We are likewise of the opinion that the dock lines thus established are still the lawful dock lines, except in so far as they may have been superseded by new lines established by lawful authority by the widening of the river, or otherwise.

The fact that private parties may for years have been encroaching upon the dock lines thus established, does not in our opinion bar the city from still insisting upon the same. For the rights of the city over the river are not *proprietary* rights, but *governmental* rights, exercised as the agent, and for the

benefit of the state, in its sovereign capacity, and no statute of limitations will run against such rights.

Trustees of Commons v. McClure, 167 Ill. 23.

Black v. C., B. & Q. R. Co., 237 Ill. 500.

Dunne v. County of Rock Island, 283 Ill. 628.

In the River and Harbor Act Congress adopted the then existing dock lines. (Sec. 10.) But at the same time it gave the secretary of war authority to change them whenever he should find that the public interests require it.

River & Harbor Act. Sec. 11.

Philadelphia Co. v. Stimson, 223 U. S. 605.

Until so changed by the secretary of war, however, the dock lines established by the city prevail. We note that the government engineers have made a survey of the river for a similar purpose, but, of course, a mere survey is of no avail. There will have to be a formal order by the secretary of war establishing new dock lines before the present ones can be considered abrogated.

We believe this answers the questions propounded in your letters.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Filling In of West Fork of South Branch.

April 23, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

Replying to your request for an opinion relative to the filling of the West Fork of the South Branch of the Chicago River, and more particularly where the ownership of the land so created would rest, we beg to say:

The Supreme Court of this state has repeatedly held that

the Chicago River and, indeed, all other rivers in the state, belong to the riparian owners, that is to say, each abutting property owner owns to the center of the stream, subject only to an easement in the public for the purposes of navigation.

City of Chicago v. McGinn, 51 Ill. 266.

People v. City of Cairo, 47 Ill. 384.

Hunter v. Middleton, 13 Ill. 50.

Canal Trustees v. Havens, 11 Ill. 554.

Washington Ice Co. v. Shortall, 101 Ill. 46.

People v. Economy Power Co., 241 Ill. 290.

Such being the law, the land created by the filling of the river would belong to the abutting owners.

We assume that you have, or expect to obtain, proper authority to do the filling, and that no objections will be interposed thereto by either the War Department of the United States or by the Department of Public Works and Buildings of the State of Illinois on the ground that the river is a navigable stream. We desire to call your attention to the fact, however, that in the case of *Economy Light & Power Co. v. U. S.*, 256 Fed. 792, recently affirmed by the Supreme Court of the United States, where they held that the Desplaines River was a navigable stream, on account of having been used by explorers and fur traders for such purposes from 1673 to 1825, they also held that a portion of the West Fork of the South Branch of the Chicago River was a part of the same water route. Possibly the Government will take the position, therefore, that this river is also a navigable stream, which can not be filled up except under a permit from the Government. The state body might conceivably raise similar objections.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Claim of S. H. Lyon, representing Charles Trego and Charles Grey, for Repair of Docks at 62 and 64 South Water Street.

April 27, 1921.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

Replying to your request for an opinion relative to the validity of the above claim, we beg to state that in our opinion the city is not liable for the same, for the following reasons:

1. As we understand the agreement under which the city vacated the street originally located along the south bank of the river, the owners thereby acquiring the land were to construct and forever *maintain*, for the benefit of the city, a public dock along such river front. (Charles Trego and Charles Grey were, as we understand, the owners of the premises here in question at the time the harbor master ordered them to repair the docks.)

It was doubtless in view of the above agreement that the city afterwards passed the ordinance now embodied in The Chicago Code of 1911, of which Section 1125 reads as follows:

“1125 . *Wharves and Docks*.—Every owner, lessee, or person in possession of premises abutting on the harbor shall at all times keep the wharves and docks on such premises in good repair and safe condition. Every person violating or failing to comply with any provision of this section shall be fined not less than twenty dollars nor more than fifty dollars for every day such violation or failure to comply shall continue. The harbor master shall notify such owner, lessee or person in possession that he will be held liable for all damage occasioned to person or property by reason of such unsafe condition of such wharves and docks.”

By virtue of the above section of the Code the harbor master did, under date of February 19, 1919, serve the following notice on the above named Charles Grey:

“You are hereby notified that there are about 22 feet of dock in need of repair located on the south side of the Main Chicago River, about 98 feet west of Dearborn street, in the rear of 62 West South Water street, and you are required, on or before 20 days after service of this

notice upon you or your representative, to commence the work of repairing said dock, subject to inspection and approval of, and under plans to be approved by the harbor master, and to prosecute the same with diligence until said dock is repaired in a satisfactory manner, *as required in Sections 1125 and 1126 of The Municipal Code of Chicago.*”

A similar notice was on the same date sent to the above named Charles Trego, relative to the portion of the dock located on his premises.

We understand the claimants take the position that, since they were not using the docks at that time, but the city had leased the same, at a small rental, to the Indiana Transportation Co., such lessee should have been required to repair the docks. Perhaps that would have been more equitable, but under the above section of the Code, the city could require *either* the owner or the lessee to do the repairing,—to say nothing of the duty of the owner under the vacation agreement first above referred to.

2. But regardless of any duty on the part of the claimants to repair the docks, there is a further reason why these claims can not be allowed, and that is that they represent *voluntary payments*, which, under well settled rules of law, can not be recovered from the city.

The claims are not for any *torts*, committed by the city, They are what is technically known as “contract” claims. In order to establish such a claim the claimants will have to prove that the city, by its duly constituted authorities, entered into a valid *contract* or agreement to reimburse them for any expense they might incur in repairing the docks. Nothing of that kind appears from the records in this case. On the contrary, the notice of the harbor master distinctly required them to do the repairing “as required by Sections 1125 and 1126 of The Municipal Code of Chicago”—in other words, *at their own expense*, and it clearly intimated that the city did *not* promise to reimburse them for the same. There was clearly, therefore, in our opinion, *no contract* on the part of the city to reimburse the claimants for their expenses in this regard.

If the claimants thought they were under no obligations

to repair the docks, they could have refused to comply with the harbor master's order, and, if the city sought to prosecute them, have made the defense in court that the harbor master was exceeding his authority. But having voluntarily made the repairs, without any promise from the city to reimburse them, they have now in our opinion, no legal basis for any claims against the city.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Police Power of City Over Armories.

April 27, 1921.

HON. JOHN C. McDONNELL, Chief Bureau of Fire Prevention
and Public Safety.

Dear Sir:

Replying to your request for an opinion as to whether the City of Chicago, through its police powers, has the right to apply its safety ordinances to state armories when rented out to private parties for entertainments, exhibitions, etc., we beg to say, that this depends somewhat upon the terms of the lease under which such entertainments are held.

Section 3 of Article XVIII of the Military Code says:

“The armory of each regiment, battalion, company, ship's crew or division shall be subject to the order of the adjutant general and be under the charge of its commanding officer.”

But, manifestly, this applies only while it *is* an armory and under the control of the military branch of the government. If it is *sold*, by warranty deed or otherwise, and thereby passes out of the control of such military authorities, it ceases to be an armory in fact, even though it may possibly continue to be spoken of as such.

Now, a lease is, in law, a temporary *sale* of the premises (and under the statute of this state a lease may be either

verbal or in writing). During the period of the lease, the lessee is the real owner and has full right of control over the premises (except in so far as it may be stipulated to the contrary in the lease). During the same period the lessor (except in so far as the lease stipulates to the contrary) has no more right of control over the premises than if he had conveyed away the same by warranty deed. Should he try to exercise such control he would be just as much of a *trespasser* as would a stranger who had never owned any interest in the premises.

We assume that the military authorities have power to lease armories for purposes such as the above mentioned. There might be a question whether under the law they are invested with such authority, but we think it is generally conceded that they are.

If, then, the proper military authorities of the state lawfully rent out an armory for any period of time (a day, a week, a month, a year, or any other period of time), the state ceases, *during such period*, to be the owner of the premises, and would be a *mere trespasser* if it should attempt to exercise ownership of the same.

Like any other lessor, however, the military authorities of the state may, in the lease, reserve certain rights (just as they might make certain reservations in a deed), but they can not, during the term of the lease, exercise any other rights in the premises than those thus reserved.

If the military authorities, in thus leasing armories temporarily to private parties, reserve the right of regulation and control, generally classed as "police power," they may perhaps exercise the same, otherwise the lease transfers full control to the lessor, who then comes under the control of the civil authorities of the state. Anyway, it is questionable how far the military authorities of the state are authorized to go into the general business of regulating entertainments and exhibitions of a civil nature.

The military branch of the government has no general police power, such as had been conferred by the Legislature upon cities and villages. It can exercise only the powers conferred by the Military Code, and in time of peace it is subject to the constituted civil authority.

Section 15 of Article II of our State Constitution says:

“The military shall be in strict subordination to the civil power.”

For the reasons above stated, we are of the opinion that where armories, located in the City of Chicago, are leased to private parties, without reservation of control by military authorities, they automatically come under the authority and control of the city authorities, during the period of such lease, and that the city may, during such period, apply its safety ordinances, require licenses and license fees, and make other reasonable regulations, in the same manner as it may do in regard to other halls in the city.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Shutting Off of Water by Landlords.

May 6, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

In reply to your request for an opinion from the corporation counsel relative to the authority of your department to forbid landlords and agents to shut off water from premises in order to force tenants to move, we beg to state that there is, in our opinion, no question of your right to do so.

Section 2742 of the City Code says:

“It shall be unlawful for any person to interfere in any manner with any water main service pipe, water meter, buffalo or shut-off box, or any water pipe connected with the city water works system or comprising a part of such system, *without permission therefor obtained from the department of public works.* Any person violating any of the provisions of this section shall be fined not less than ten dollars nor more than one hundred dollars for each offense.”

We note you say that landlords and agents contend that because the check and waste rods and valves used to turn off the supply are within the buildings and not on public property, therefore the city has no authority to make any regulations in regard to the same.

That contention is, in our opinion, wholly without merit. The fact that a person owns the premises, does not authorize him to do altogether as he pleases on the same; for if that were so, he might, for instance, run a gambling joint, or conduct the illicit sale of liquor on the same, and the city would be powerless to stop it. But the same principle applies—only, perhaps, in a less degree—to the regulation of the water system of the city. The city has the power to make reasonable rules and regulations, and the City Council in the exercise of that power, has ordained that no person shall be permitted to turn on or shut-off the water supply of any premises without a permit from the commissioner of public works.

In passing the Water Works Acts of 1873, the Legislature made this provision in Section 4 thereof:

“The common council of such cities, or trustees of such towns or villages, shall have power to make and enforce *all needful rules and regulations* in the erection, construction or management of such water works and for the use of water supplied by the same.”

And Section 2733 of the City Code reads:

“Every consumer of water and every owner, occupant or person in possession, charge or control of any building, structure or premises supplied with water through the Chicago water works system shall be governed by and subject to the provisions of this chapter and such rules and regulations as may from time to time be adopted and approved by the City Council governing or concerning the use of water. *It is hereby made the duty of the commissioner of public works* to enforce the provisions of this chapter and such rules and regulations as may be adopted as aforesaid.”

We note your suggestion that your power to forbid the shutting-off of water as aforesaid might be placed on the ground that such shut-off would tend to render the premises unsanitary. We believe that reason is sound, but we do not

believe you are limited to that ground. A more comprehensive view would be to say that, since the city has, under legislative authority, engaged in the business of selling water, which is pumped by water works owned by the city and passes through a system of water pipes, the principal part of which is located in streets and other public grounds, the city has the right to sell water on any reasonable terms it deems proper and to make any reasonable rules and regulations it sees fit in regard to the distribution of such water supply and the use of the system of pipes employed for such purposes, not only those actually owned by the city but also any private pipes taking city water. Nor do we think that an ordinance requiring a permit from the commissioner of public works to turn on or shut off the water supply to or from any premises can be considered at all unreasonable. And in granting or refusing such permits the commissioner of public works should act with judgment and discretion, for the best interests of the general public, and not subservient to the ulterior purposes of any individuals.

We might add, that it is no part of the duty of the Bureau of Water, or any other department of the city government, to serve as a *collection agency* for the sole benefit of private individuals. That is not what the public is paying or maintaining the department for. And any person who thus attempts to get his rent or other bills collected at public expense, should be warned to desist from such reprehensible practices, and reminded of the penalty which the ordinance prescribes therefor.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Rights of Property Owners Concerning Dry Cleaning Plant.

May 9, 1921.

HON. JOHN C. McDONNELL, Chief Bureau of Fire Prevention and Public Safety.

Dear Sir:

Replying to your letter of the 3rd instant with enclosed protest from the neighboring property owners against the re-establishment of a dry cleaning plant at 3310 Indiana avenue, and your request for an opinion from the corporation counsel relative to the rights of the parties in the matter, we beg to say:

We note from your letter that a licensed dry cleaning plant was operated on said premises some years ago, the last license therefor having been issued for the year 1918, but that the business was thereupon discontinued for a *space of two years*, although the plant was never dismantled but the machinery remained on the premises and was still there when application was made, last March, for the reopening of the premises as a dry cleaning establishment.

The question in the case is, as we understand it, whether, under the facts above stated and under the ordinance of June 25, 1917, the place may be reopened as a dry cleaning establishment, without first complying with the provisions of the ordinance as to frontage consents, etc., or whether it is exempted from those requirements under the following provision of the ordinance:

“Every such building shall be detached and at least fifty (50) feet from any other building or structure or to line of adjoining property which may be built upon; provided, however, that the use of any building in which a dry cleaning business was carried on prior to July 22, 1912, may be continued where such building is separated from all other buildings by a fire wall with no openings into any adjoining building; and provided further that any building previously used for dry cleaning but not so occupied or used for such purpose for a period of three (3) consecutive months immediately prior to the passage of this amendatory ordinance, shall not again be used for

the business of dry cleaning unless all requirements governing new buildings or dry cleaning plants have been complied with.”

As we understand this section, it merely provides that a building which had been continuously occupied as a dry cleaning establishment from 1912 until within three months of the passage of this ordinance need not be *remodeled* to comply with the more stringent requirements of the new ordinance. It does not, in our opinion, dispense with the frontage consent provided for in the first section of the ordinance. Nor does it, in our opinion, permit a building, after it has once been *discontinued* as a dry cleaning establishment, to be again used for that purpose without complying with all the requirements of the existing ordinance.

In this case, we take it, there can be no question that the building was *discontinued* as a dry cleaning establishment. For the fact that no license for such purpose was taken out for three years, will preclude any one from claiming that he *lawfully* carried on any such business there during that time. That the old machinery may still have been left on the place, does not, in our opinion, alter the situation.

We are of the opinion, therefore, that no dry cleaning business can now be lawfully carried on at 3310 Indiana avenue unless the proprietor of such business will comply with the requirements of the present ordinance.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Control of Boxing Match on U. S. S. Commodore.

May 14, 1921.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

Replying to your letter of the 13th instant requesting an opinion from the corporation counsel relative to your author-

ity to prevent a certain boxing match advertised to take place this evening on the *U. S. S. Commodore*, we beg to state that if, as we understand the facts to be, it is contemplated to commit within the territorial jurisdiction of Illinois a crime forbidden by the laws of Illinois, we have no hesitancy in saying that you have the authority, as general superintendent of police, to stop the same.

While we have not had sufficient time to prepare as extensive an opinion as the importance of the question would warrant, yet in view of the urgency of the matter, we submit briefly the following reasons and authorities for our opinion:

In the first place, all jurisdiction over crimes committed within the territorial limits of the state belongs to the state unless conferred upon the Federal Government.

Secondly, the Federal Government has not seen fit to assume jurisdiction over any crimes committed upon any vessel—war vessel or otherwise—while within the harbors or territorial waters of any state.

The Federal statute on that subject reads as follows:

“§ 9973. PLACES AND WATERS TO WHICH CHAPTER APPLICABLE.—The crimes and offenses defined in this chapter shall be punished as herein prescribed:

“First. When committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, or when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any state, territory, or district thereof.

“Second. When committed upon any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes namely: Lake Superior, Lake Michigan, Lake Huron, Lake St. Clair, Lake Erie, Lake Ontario, or any of the waters connecting any of said lakes, or upon the River St. Lawrence where the same constitutes the International boundary line.

“Third. When committed within or on any lands reserved or acquired for the exclusive use of the United

States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the Legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

“Fourth. On any island, rock, or key, containing deposits of guano, which may, at the discretion of the president, be considered as appertaining to the United States. (C. C., § 272; R. S., § 5339; Acts Sept. 4, 1890, c. 874, 26 Stat. 424; March 4, 1909, c. 321, § 272, 35 Stat. 1142.)”

This statute has remained essentially unchanged for over a hundred years, and has been frequently construed.

In the early case of *United States v. Beavans*, 3 Wheat. (16 U. S. Rep.) 336, a murder had been committed on the United States warship Independence, in Boston harbor, and the question arose whether the state or the United States had jurisdiction of the offense. The case was ably argued by Attorney General William Wirt for the prosecution and by Daniel Webster for the defendant, and the opinion was delivered by Chief Justice Marshall.

The court held that while Congress might have the power to take the jurisdiction over such cases out of the hands of the state authorities, it has not seen fit to do so. The language of the court is:

“Whatever may be the constitutional power of congress, it is clear that this power has not been so exercised, in this section of the act, as to confer on its courts jurisdiction over any offense committed in a river, haven, basin or bay; which river, haven, basin or bay is *within the jurisdiction of any particular state.*”

It was argued in that case that a war vessel of the United States was a “place” under the exclusive control of the United States just like a fort, an arsenal, etc. But the Supreme Court disapproved that doctrine and held that a “place” means something stationary and that there were no regulations of Congress exempting a vessel from local laws when in a harbor or other territorial waters of a state.

The principle contended for by Daniel Webster, and upheld by Chief Justice Marshall, in *U. S. v. Beavans*, *supra*,

is still the law, and has been reiterated in many later cases, among them:

Manchester v. Massachusetts, 139 U. S. 240.

United States v. Rogers, 150 U. S. 249.

Mo. Pacific Ry. Co. v. U. S., 211 Fed. 893.

Atlantic Transport Co. v. Imbrovek, 234 U. S. 52.

We are of the opinion, therefore, that if you have information that a crime against the laws of the State of Illinois is about to be perpetrated, on a vessel of the United States, while stationed within the territorial waters of the State of Illinois and the City of Chicago, you have the authority, as superintendent of police of such city, to take the necessary steps to prevent such crime.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Proposed Garage at E. 50th Place and Cottage Grove Avenue.

May 18, 1921.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

Replying to your request for an opinion relative to your authority regarding a permit for the construction of the above mentioned garage, we beg to say:

We understand the facts to be, that, on April 11th, last, you issued a permit, based upon an application accompanied by the written consent of what purported to be the owners of the majority frontage; that on the afternoon of the same day, however, you discovered that certain of the property owners had withdrawn their consent prior to the issuance of the permit; that you then immediately ordered the petitioner to take no action under the permit until he should secure sufficient additional frontage consent to constitute a majority; that you

did not, however, formally cancel the permit already issued; that he thereafter proceeded to get additional frontage consent and filed the same with your department, and that you referred the same to the superintendent of maps for verification; that on April 14, the superintendent of maps made a formal report to you which showed that the petitioner had the consent of the owners of a majority of the frontage and 117.42 feet surplus; that on the following day, April 15th, before you had taken any further action in the matter, certain property owners owning approximately 150 feet frontage filed with you a formal withdrawal of their consent to the issuance of the permit.

Under the facts as above stated we are of the opinion that the petitioner is entitled to his permit.

In the first place, on April 14, 1921, the petitioner unquestionably had a majority frontage consent and he also had his permit, for that had never been cancelled. That, in our opinion, made his right complete.

But we believe another and broader reason can be given to sustain the permit. In cases where frontage consents of this nature are required, we understand the law to be that a signer has the right to withdraw his name at any time before the required number of signatures have been obtained, but as soon as the required number of persons have signed the consent, it becomes a binding *contract* from which no signer can withdraw except on the ground of misrepresentation or fraud or such other legal grounds as would justify him in repudiating any other contract.

Wayne City Drainage Dist. v. Boggs, 262 Ill. 331.

We understand it to be the practice in your department, however, to consider withdrawals *at any time before the actual issuance of the permit*, as sufficient ground for holding up the permit, regardless what reasons may be assigned for such withdrawal. No doubt that is a safe general rule for you to follow; for the commissioner of buildings can not, of course, be expected to pass on the judicial question whether the signers have sufficient legal grounds for withdrawal.

In ordinary cases, therefore, we would not advise you to change your rule in that regard.

But this case is not an ordinary one. Here the property owners have changed their minds back and forth so many times that we believe the burden of proof has shifted to them to justify their objections, and that the commisisoner of buildings is no longer required to *assume* that they have any valid legal objections that they have not formally stated. Now, the sole reason given by each of the protesters in their latest attempt to withdraw their consent is:

“said petition having been signed by me under a misapprehension of the facts.”

They do not state, however, that such misapprehension was due to any fraud or other misconduct on the part of the petitioner, and, unless it was, it would be no ground for the withdrawing from a contract fairly entered into. Considering also that each of the protesters had first signed the consent, then a protest against the petition, then a withdrawal of their protest and lastly a withdrawal of such withdrawal, we believe that any “misapprehension of the facts” that they may have, must be held to be due to inexcusable negligence on their part and is entitled to no consideration in law.

We are of the opinion, therefore, that the petitioner should be permitted to proceed with the erection of his garage under his permit.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Exemption of Employers of Disabled Soldiers.

May 26, 1921.

HON. JOHN A. RICHERT, Chairman Finance Committee.

Dear Sir:

Replying to your request for an opinion relative to the authority of the City Council to pass an ordinance exempting disabled ex-soldiers from the number of employes upon

which an individual, firm or corporation is required to pay license fees, we beg to state, that in our opinion such ordinance would be perfectly valid.

Were it a question of a *tax*, instead of a license fee, we should have no hesitancy in saying that the City Council would be without authority to make such exemption, for our State Constitution has made express provisions in regard to taxes, and Article 9, Section 9, thereof specifically provides that all taxes levied by a municipality must be "uniform in respect to persons and property within the jurisdiction of a body imposing the same," and Section 3 prohibits any exemptions other than those specifically named in the Constitution.

But our Supreme Court has repeatedly held that a license fee is not a tax.

"We have so repeatedly and uniformly held that a license fee is not a tax in the constitutional sense, that it may be regarded as settled."

Braun v. Chicago, 110 Ill. 186.

Other cases to the same effect are:

Wiggins Ferry Co. v. City of E. St. Louis, 102 Ill. 569.

Cole v. Hall, 103 Ill. 30.

Howland v. City of Chicago, 108 Ill. 496.

People v. Steele, 231 Ill. 340.

Metropolis Theater Co. v. Chicago, 246 Ill. 20.

A license fee is in the nature of a payment for services supposed to be rendered by the municipality, though it may incidentally be for revenue. The only limitation upon a license fee is that it must be *reasonable*.

City of Lake View v. Tate, 130 Ill. 247.

City of Cairo v. Fenchter, 159 Ill. 155.

While "reasonableness" will no doubt require a certain amount of *uniformity* as to persons similarly situated, yet it is not subject to the hard and fast rule which the constitution has established in that regard in reference to taxes; but considerable discretion is left to the City Council. But it is also true, as stated by our Supreme Court:

“A law that is made applicable to a certain class or classes of citizens must be based upon *some substantial difference* between the situation of that class or classes and other individuals or classes to which it does not apply.”

City of Clinton v. Wilson, 257 Ill. 580.

The same was held in:

People v. Elerding, 254 Ill. 579.

Ritchie v. Wayman, 244 Ill. 509.

We do not believe anybody will find any difficulty in justifying the reasonableness of exempting disabled ex-soldiers in the manner above stated. Aside from patriotic and humanitarian grounds, there is the further technical ground, sometimes stated by the courts, that unless a disabled soldier is given an opportunity to support himself, he may have to be supported by, and thus become an expense to the community; that it may be good economy, therefore, for the community to assist him in getting a job.

We have prepared an ordinance in accordance with your suggestions which we herewith submit to you.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Right of City to Collect Back Compensation for Use of Sub-Sidewalk Space.

May 27, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

Replying to your request for an opinion relative to the validity of the city's claims against certain State street stores, for back compensation for the use of sub-sidewalk space, I respectfully submit the following:

The compensation in question is alleged to be for a period (or, rather, divers respective periods) prior to the year 1912,

and to have accrued under the ordinance of 1906, which was repealed on January 29, 1912, when a new and radically different ordinance was adopted in its place.

The Municipal Code of Chicago of 1905 had a provision for compensation for the use of sub-sidewalk space. This provision was modified by the ordinance of February 5, 1906, which provided for a greatly increased amount of compensation. The validity of this ordinance was attacked in the courts by divers parties and on divers grounds. While the matter was thus pending in the courts, it appears that the city made no effort to collect any compensation, except from parties who applied for permits to erect new buildings. As to these the commissioner of public works appears to have adopted the policy of refusing a building permit unless the applicant also took out a permit to use sub-sidewalk space, and signed what was supposed to be an agreement to comply with the above ordinance. (But, as we shall hereafter see, the agreement merely bound the applicant to comply with any valid ordinance, that might from time to time be in force, which was no more than what the law would have required him to do anyway, without any agreement.) Accordingly, the following parties among others, took out such permits for the use of sub-sidewalk space, under the ordinance of 1906, and paid compensation thereunder for the following periods respectively:

- Marshall Field & Co., up to January 1, 1907;
- Carson, Pirie, Scott & Co., up to January 1, 1907;
- Otto Young Estate (Heyworth Bldg.), up to January 1, 1907;
- Mandel Bros., up to January 1, 1908;
- Boston Store, up to January 1, 1909;
- Chas. A. Stevens & Bros., up to July 1, 1910.

On October 28, 1910, several suits brought to test the validity of the ordinance, were decided by the Supreme Court of Illinois, that tribunal holding that the ordinance was valid as to streets acquired by the city by statutory dedication, but invalid as to streets acquired by common law dedication or by condemnation.

This decision of the Supreme Court is embodied in the following cases:

Ryerson v. City of Chicago, 247 Ill. 185.

Tacoma Safe Deposit Co. v. City of Chicago, 247 Ill. 192.

Sears v. City of Chicago, 247 Ill. 204.

Farwell v. City of Chicago, 247 Ill. 235.

N. W. Trust Co. v. City of Chicago, 247 Ill. 238.

Williams v. City of Chicago, 247 Ill. 240.

Illinois T. & S. Bank v. City of Chicago, 247 Ill. 264.

Sheldon v. City of Chicago, 247 Ill. 267.

This decision was very much discussed at the time, both in the City Council and elsewhere, and there were differences of opinion as to the equitableness of the distinction thus drawn by the court. While the decision no doubt was technically correct, according to the rule of distinction which the Supreme Court had been following for more than half a century (although the wisdom of adopting the rule in the first place has often been questioned), yet from an equitable and economic point of view, the decision was by many considered unfortunate, as tending to produce very inequitable results, in that it permitted certain parties to reap lucrative rewards from what was often a mere carelessness on the part of the man who platted their property, while the more careful plat maker (whose plat conformed strictly with the statute) was hard hit by the law. This view appears to have prevailed in the City Council. Accordingly on January 29, 1912, they repealed the ordinance of 1906 altogether, both as regards streets acquired by statutory dedication and as to streets acquired by common law dedication or condemnation, and adopted instead a new ordinance providing for a mere inspection fee, and applicable to all streets alike.

The first question, then, is, what effect did this repeal of the ordinance of 1906 have upon compensation accrued under the same, but not paid, and for which no judgment had been obtained? Did it cancel the same?

In determining that question, we will have to be governed somewhat by recognized rules of legal construction and the

presumptions they give rise to. There is, for instance, the rule that *remedial legislation must be liberally construed* to secure the greatest amount of relief reasonably consistent with the language used. As I understand the facts, the ordinance of 1912, repealing that of 1906, was intended by the City Council as a relief measure, they deeming the ordinance of 1906 unjust as to certain parties. But if it was unjust as to amounts that might accrue *after* January 29, 1912, it was equally unjust as to the amount that accrued *before* that date. If, therefore, the City Council had the power to cancel any amounts already accrued, but still unpaid, and the ordinance of 1912 can reasonably bear such construction, we must, under well-settled rules of interpretation, so construe it.

As to the power and authority of the City Council in that regard, little need be said. It is true that a city can not release or surrender a valid, *vested* right, without consideration.

Agnew v. Brall, 124 Ill. 312.

Chicago v. P. C. C. & St. L. Ry. Co., 244 Ill. 220.

But claims resting solely on a statute or ordinance and not secured by any binding contract or judgment, are not considered "*vested*." (*Van Inwegen v. City of Chicago*, 61 Ill. 31.) Even if they were, the passage of one revenue measure, with its expected new source of income, would undoubtedly be a sufficient consideration for the repeal of another, with incidental release of liability under the same. In my opinion no question as to the authority of the City Council can therefore arise in this case.

The general rule as to the effect of repealing a statute or ordinance is that it wipes out the pre-existing ordinance *as completely as if it had never existed*. No rights can thereafter be based on the same; and no suits based on the same can be maintained (unless they have already been put in judgment, and in that event the suit will have to be on the judgment, not on the original claim).

In the case of *Surpees v. Ellison*, 9 Barn. and Cress. 750. Lord Chief Justice Tenterden said:

"It has long been established that when an act of Parliament is repealed, it must be considered (except as

to transactions past and closed) as if it had never existed.”

There are only two exceptions to this rule:

1—Where the repealing statute or ordinance expressly excepts pending matters from repeal; and

2—Matters already closed, as where a claim had been paid or put in judgment.

The above rule has frequently been stated by the courts of this and other states.

Van Inwegen v. City of Chicago, 61 Ill. 31.

Naylor v. City of Galesburg, 56 Ill. 285.

Butler v. Palmer, 1 Hill (N. Y.) 324.

Eaton v. Graham, 11 Ill. 619.

Illinois and Mich. Canal v. City of Chicago, 14 Ill. 334.

Wilson v. O. & M. Ry. Co., 64 Ill. 542.

Menary v. Kincaid, 71 Ill. 587.

Town of Jefferson v. People, 87 Ill. 503.

Holcomb v. Bounton, 151 Ill. 294.

Vance v. Rankin, 194 Ill. 625.

Wall v. Chesapeake & Ohio Ry. Co., 290 Ill. 227.

Lewis v. Foster, 1 N. H. 61.

Harton v. Incorporation of Gadsden, 79 Ala. 495.

Town of Rutherford v. Swink, 96 Tenn. 564.

Musgrove v. Vicksburg, etc., R. Co., 56 Miss. 677.

City of Kansas v. Clark, 68 Mo. 588.

McQuilkin v. Doe, 8 Blackf. (Ind.) 581.

Ex parte McCardle, 7 Wall (U. S.) 506.

The case of *Van Inwegen v. City of Chicago*, *supra*, was an action of debt brought by the city against James Van Inwegen to recover from him a statutory fee of two per cent on the premiums paid to him as agent of the Astor Insurance Company of New York, and was instituted under the statute of 1863, which provided that foreign insurance companies should pay semi-annually to the city treasurer, two per cent upon the amount of all premiums received by them in such city. After the premiums had been received by the company, but before the institution of the suit, the statute was re-

pealed by the Legislature, and a new statute enacted on the subject. The company contended that the repeal of the statute wiped out all amounts due under the same at the date of such repeal. The Supreme Court sustained their contention, saying:

“The question then arises, which has been discussed at great length, *what is the effect of the repeal on causes of action existing before and at the time of the repealing statute?*

“We believe the rule is well settled that as to inchoate rights—rights not carried into judgment, and so not executed, can not be and are not, saved, in the absence of a saving clause in the repealing statute. The doctrine is that inchoate rights, derived under a statute, are lost by its repeal, unless saved by express words in the repealing statute, and unless those rights have become as far perfected as to stand *independent of the statute* (*Butter v. Palmer*, 1 Hill 324), that is to say executed.
* * *

“The effect of a repealing statute is to obliterate the prior law as completely from the records, as if it had never passed, and it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted and *concluded* while it was an existing law. *Ray v. Goodwin*, 4 Moor and Payne 341; *Devarris on Statutes*, 676.

“The clear result of all authorities is, when a statute as in this case, gives a right in its nature not vested, but remaining executory, if it does not become executed before a repeal of the law giving the right, it falls with the law, and it can not thereafter be enforced.

“It is unnecessary to argue the proposition that this right to sue for the percentage was not such a right as in legal parlance is termed vested.”

In *Naylor v. City of Galesburg*, *supra*, the principle was applied to the repeal of a city ordinance. The Supreme Court said:

“The law is too well settled to require argument that the repeal of an ordinance puts an end to all proceedings growing out of it, and pending at the time of repeal, unless saved by a clause in the repealing ordinance.”

The foregoing rule has been abolished in this state, so

far as *statutes* are concerned by the statute of 1859 in relation to repeal by implication.

Ill. Rev. Stat., Chap. 131, Sec. 4.

But the common law in that regard still prevails in this state, so far as ordinances are concerned. Our Supreme Court has said:

“This rule of the common law prevails as to ordinances of a town, notwithstanding the statute of 1859, in relation to repeal of laws by implication. Sess. Laws of 1859, p. 52. That act applied solely to statutes, enacted by the Legislature, and not to the laws of a corporation; and we can not extend its operation to ordinances.”

Naylor v. Galesburg, 56 Ill. 285.

The claims for compensation fees, here in question, had not been put in judgment when the repealing ordinance of 1912 was passed. They can not therefore be said to have been saved from repeal, unless expressly excepted by the repealing ordinance. Let us examine its language in that regard.

The repealing ordinance of January 29, 1912, contained these provisions:

“Section 1. That Sections 2299, 2303 and 2309 of Article III of Chapter LXVI of The Chicago Code of 1911, be and the same is hereby repealed.

“Section 2. That an ordinance amending Article III of Chapter LXVI of The Chicago Code of 1911, passed by the City Council on October 30, 1911, be, and the same is hereby repealed.”

So far, of course, it was an absolute and unconditional repeal. But the ordinance also contained the following *saving clause*:

“Whenever any party holding a contract or permit for the construction or maintenance of any space vault or structure, under the sidewalk of any street, alley or other public place in this city, or for the construction or maintenance of any coal hole, trapdoor, or other opening in the sidewalk, which shall have been issued under the terms of any ordinance or council order heretofore in force, *the conditions of which have been and are now being fully complied with*, shall apply for a permit hereunder and shall desire to have the permit or contract heretofore entered into under such ordinance, heretofore

in force, cancelled, the commissioner of public works shall cancel the same as regards any liability hereunder arising after the date of the issuance of the new permit hereunder, but such contract or permit and the bond given thereunder shall remain in full force and effect as to all rights and liabilities accruing under the same, including all amounts due the City of Chicago for fees or compensation under the same, up to the time of said cancellation, otherwise such contracts and permits shall remain in full force and effect."

Ordinance of January 29, 1912 (C. P. p. 2678).

It will thus be seen that the City Council clearly intended to save from repeal or cancellation the amounts due from *some*, but not *all*, property owners who had taken out permits under the ordinance of 1906. The most natural thing would have been to draw the line between property owners on streets acquired by statutory dedication (whom the Supreme Court had held to be liable to pay the compensation in question) and property owners on streets acquired by condemnation or common law dedication (whom the Supreme Court had held to be exempt from the payment of such compensation). Unless the latter, at least, were exempted from paying the back compensation, the ordinance would clearly have been unconstitutional. Unfortunately, however, while the City Council, or some of its members, may possibly have intended to make that distinction, they did not express themselves that way, but, knowing that the property owners exempted by the Supreme Court had long since quit paying any compensation, and erroneously assuming, perhaps, that those not thus exempted by the Supreme Court had fully paid up—"fully complied with the terms of their permits"—the City Council fell into the error (if such it was) of drawing the line between permits "*the conditions of which have been and are now fully complied with*" and permits not thus complied with. *Only the former were exempted from repeal and cancellation*; all permits of the latter kind fell under the general repealing clause of the ordinance.

As the property owners now involved were all in arrears on January 29, 1912, the saving clause did not apply to them,

but they all came under the general repealing clause the effect of which was to wipe out any amounts theretofore due, but not paid or put in judgment.

The saving clause of the repealing ordinance mentioned only one class of permit holders. What was to happen to other permit holders, it does not say. Possibly the City Council was laboring under the impression that their liability would remain. But if so, they were mistaken as to the law and the legal effect of the ordinance. However, there is nothing in the ordinance that would justify any legal *presumption* that the City Council was ignorant or uninformed as to the law. Anyway, the courts must construe an ordinance according to the language used, as interpreted by recognized rules of construction, and not according to any merely conjectured, unexpressed intentions of the persons who voted for it.

I am of the opinion, therefore, that the repealing ordinance of 1912 had the effect of cancelling any uncollected compensation that may have accrued under the ordinance of 1906, but which had not been put into judgment, or otherwise "so far perfected to stand independent of the ordinance."

There remains then the question whether the space-users in question have, by any contract or agreement, obligated themselves to pay the back compensation in question and thereby "so far perfected" the city's claim thereto that the same will "stand independent of the ordinance."

The *permit* granted to the user of sub-sidewalk space, together with his acceptance thereof and the bond given in connection therewith, have sometimes been spoken of as a "contract." But a careful examination of the same will show that they did not constitute any contract in a legal sense, firstly because there was no consideration for the same, and secondly because it did not obligate the permit holder to do anything except what the ordinance should from time to time require him to do, without any contract. The permit merely stated that it was subject to the "conditions and restrictions of the ordinances and orders of the City Council which have been passed *or shall hereafter pass.*"

Manifestly, therefore, if the City Council should pass a new ordinance reducing the amount of compensation to be paid, or wiping it out altogether, the permit holder would, under the terms of his permit, be entitled to avail himself of such terms of such new ordinance.

The *acceptance* of the permit merely read:

“The conditions of this permit are hereby accepted and I agree to all the terms and conditions of the same.”

In other words, he merely agreed to fulfill his legal obligations, *whatever they might from time to time be*.

The *bond* given by the permit holder to the city was equally vague. It merely obligated him to

“well and truly pay or cause to be paid to the said City of Chicago, *the compensation required by the said permit.*”

But considering that the permit only obligated him to pay what the ordinances should from time to time require, it naturally follows that any new ordinance which should wipe out any amount theretofore due, would relieve him from any liability on his bond. The point is, that neither the permit, the acceptance thereof, nor the bond, obligated him to pay any fixed definite amount, in all events, regardless of any changes in the ordinances. Viewed as a contract, therefore, it seems to me that his promise must be regarded in law as a mere *nudum pactum*.

I understand also that, in 1912, when the parties above mentioned took out new permits under the new ordinance, they made some kind of a promise to pay these back payments if the Finance Committee of the City Council should insist on it, or so much thereof as said committee should insist upon. That promise, no doubt, would be entitled to great moral weight in possible negotiations for a settlement, but legally its effect was *nil*. For a gratuitous promise to pay a debt which one does not owe, is clearly without consideration, and may be withdrawn at any time. It will be observed that this promise was neither an agreement to pay a fixed sum, definitely agreed upon as a *compromise*, nor was it a submission of the claims to the *arbitration* of a *disinterested* third party. It was a promise made direct to the official representative of the other

party to the transaction, without any consideration being given in return. Whatever may be thought of their *moral* right to withdraw such a promise, their legal right to do so seems to me to be unquestionable.

I have based this opinion on the facts above stated. If I am in error as to the facts in any material respect, naturally the opinion will have to be modified to that extent. But I have stated the facts as I understand them to be after a careful examination of the documents in the case.

I have also given what appears to me the most reasonable interpretation of the repealing ordinance of 1912. That no other interpretation is possible, I would not presume to say. But I confess that I have been unable to find any other interpretation which would be reasonable and at the same time stand the test of recognized rules of legal construction. That the City Council may have intended to say something very different from what they did say in that ordinance is not impossible. But, on the other hand, it is quite as possible that they meant to say exactly what they did say. At any rate I find nothing in the ordinance that would justify the courts in assuming that the City Council had any other intentions than those expressed or legally implied in the ordinance.

If suits should be brought upon these claims, it is my opinion, therefore, that the city would have small chance of recovering anything. However, I believe there are strong moral reasons why the parties in question ought to, and doubtless will, agree to liberal settlements of these claims. One is the so-called "gentlemen's agreement" to that effect, made by them in 1912. Another reason is the strong probability that the City Council passed the ordinance of 1912 under a misapprehension of the law. For these, and perhaps other additional reasons which you may have knowledge of, I would urge that these claims be taken up with the parties in question for settlement.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

**Power of Commissioner of Public Works to Limit Tonnage
of Motor Vehicles on Public Streets.**

May 28, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

Replying to your request for an opinion relative to the power of the commissioner of public works to limit the tonnage of motor vehicles operating over city streets and bridges, we respectfully submit the following:

In the first place, streets are laid out and maintained for *ordinary* traffic, and the same principle applies to bridges, for they are considered in law as merely a part of the streets which they connect. Under this rule, no person has any right to drive any load of extraordinary and unusual weight over any streets or bridges. It is easy to see if, for instance, a railroad company should attempt to drive a modern locomotive engine, or a loaded freight train upon the pavement of a street that it would ruin the street, and would accordingly constitute a nuisance which the city would have the right to forbid. But it is not necessary to take such an extreme case, for the same principle would apply to any other unusually heavy load, in excess of which the street or bridge was reasonably calculated to accommodate.

At common law it was an indictable offense to haul an unusually heavy load over a public highway. Thus, in the case of *The King v. Egerly*, 3 Salkeld's Reports 183, an indictment was sustained against a common carrier for carrying in a wagon an unusual load, namely, 3,000 or 4,000 pounds weight at one time, "by which he spoiled the highway leading from Oxford to London."

While modern streets and bridges are constructed to accommodate larger vehicles and heavier loads than those of former times, yet it is still the law that hauling unusually heavy loads (according to the standards and customs of the time and community) over streets and bridges may constitute a *nuisance*, which may be forbidden by the municipal authorities.

Elliott on Roads and Streets, Sec. 649.

Just how heavy a load may be before it becomes an improper burden upon streets and bridges,—in other words, a nuisance—is generally a matter for the City Council to determine. It is only where the offense is so flagrant as to leave no room for possible difference of opinion, that the commissioner of public works would, in our opinion, be justified in acting upon his own authority without special authorization from the City Council.

That the City Council has full authority in this regard can not be doubted. Thus, Par. 7 of Section 62 of the Cities and Villages Act gives the city power to establish streets; Par. 9 gives the city power “to regulate the use thereof;” Par. 28 gives the city power “to construct and keep in repair bridges, viaducts and tunnels, and to regulate the use thereof;” Par. 66, “to pass and enforce all necessary police ordinances;” and Par. 75, “to declare what shall be a nuisance, and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist.”

That a city owes no duty to anybody to establish or maintain streets and bridges for anything except ordinary travel is well settled.

In *Wilson v. Town of Granby*, 47 Conn. 59, the court said:

“If a ponderous locomotive steam engine should be propelled over a town bridge, no one, we presume, would claim that the town ought to have provided for it. This is of course an extreme case, but it illustrates a principle applicable as well to any unusual and extraordinary load, however propelled along a road, not reasonably to be expected to pass over it. Our reasoning results in the conclusion that if a person uses the town bridges and roads in any way that clearly transcends the limits of the town’s duty, he must necessarily take the risk upon himself.”

In the case of *Gregory v. Adams*, 80 Mass. 242, the court in discussing the question whether a town was in duty bound to build bridges strong enough for an elephant to cross, said:

“There is no limitation or restriction, in the use of a public highway, to the horses, teams and carriages mentioned in the statute, but all persons may lawfully go and

travel upon it with any animal or any vehicle which is suitable for a way prepared and maintained so as to supply and afford the usual and common accommodation needful to or required by the community. * * *

"This is the measure and extent of the obligation of towns in reference to the support and maintenance of public highways. They are not required to make preparations for the safety or convenience of those who undertake to use those ways in an unusual or extraordinary manner, involving peculiar and special peril and danger, whether it be in respect to the kind or character of animals led or driven, *or the magnitude or construction of carriages used, or the bulk or weight of property transported.* * * * No one can be justified in an unusual and peculiar use of a public easement, which will either necessarily or probably operate to the prejudice, disadvantage or injury of others, who have rights fully commensurate with his own."

In *Clapp v. Town of Ellington*, 51 Hun (N. Y.) 58, the court, after quoting, with approval, the case of *Gregory v. Adams*, *supra*, said:

"It appears to us that the rule thus laid down is both wise and just. The commissioner of highways is required to construct and maintain bridges of sufficient strength and material to insure the safety of persons passing over them with such vehicles as are commonly or ordinarily used in that country; but he can not be required or expected to construct and maintain bridges which will insure the safety of persons passing over them in a manner involving peculiar and special danger arising from *unusual weight* and so forth."

In *McCormick v. Township of Washington*, 112 Pa. St. 185, the Supreme Court of Pennsylvania said:

"The duty of a township to keep its roads and bridges in repair was correctly stated by the learned trial judge. It, however, is not required to assume that its bridges will be used in an unusual and extraordinary manner, either by crossing at a great speed or by the passing of a very large and unusual weight. As it does not anticipate any such use it is not required to so build as to protect against injury resulting from such reckless conduct. Its liability stops with constructing and maintaining its bridges so as to protect against injury by

a reasonable, proper and probable use thereof in view of the surrounding circumstances.”

In *Fulton Iron Works v. Kimball*, 52 Mich. 146, the Supreme Court of Michigan said:

“It is reasonable to hold that in determining to build a bridge for general uses, it can not be expected that the designers will anticipate uses which have not been known, and necessities which are not within ordinary experience. It can not be a legal wrong to build according to the light of the times when the building is done. The law of 1879 does not require changes to be made in the plan of existing bridges. When it requires repairs it may fairly be construed as requiring bridges to be put in as good a condition of strength and soundness as would make them as secure as new bridges of the same kind and plan. But it does not require a different structure.”

Accordingly it was held in that case that the township was under no obligation to build bridges strong enough for steam threshing engines to pass over.

In *City of Wabash v. Carver*, 26 N. E. 42, which was a suit for damages for injuries caused by a bridge giving way when a steam traction engine was moved over the same, the Supreme Court of Indiana said:

“The city was not bound to assume that the bridge would be used, without notice to it, in an unusual and extraordinary manner, by propelling upon it a vehicle or caravan of vehicles of unusual weight or construction. Its duty to the public was performed when it had constructed and maintained a bridge such as would subserve the reasonable and proper uses for which it was designed, in view of the surrounding circumstances, and of the nature of the travel and business on the road of which it formed a part.”

Other cases to the same effect are:

Richardson v. Turnpike Co., 5 Vt. 580.

Yordy v. Marshall Co., 80 Iowa 405.

Dexter v. Canton Toll Bridge Co., 79 Me. 563.

Commissioners of Clark Co. v. Brod, 29 N. E. 430.

Vermilion Co. Comrs. v. Chipps, 131 Ind. 56.

Dickson v. Kewanee Light & Motor Co., 53 Ill. App. 379.

We are of the opinion, therefore, that the City Council has reasonable discretion and power of limiting the tonnage of motor vehicles operating over city streets and bridges.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Exemption of Sanitary District From Water Rates.

June 4, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

We are in receipt of your request for an opinion relative to the right of the Sanitary District of Chicago to be exempted from water rates; also enclosed copy of an opinion of Wm. F. Mulvihill, attorney for the Sanitary District, relative to the question.

We note that Mr. Mulvihill takes the position that the Sanitary District should be exempted from the payment of water rates, because Section 2755 of The Chicago Code of 1911 provides for remitting all water rates assessed against

“any charitable, *municipal*, religious or educational *institution in the city*.”

We believe that argument is too far fetched. The Sanitary District is neither, in our opinion, an “*institution*,” nor is it located “*in the city*.” It is a *municipal corporation* and covers an area which only in part coincides with the City of Chicago. In passing the ordinance aforesaid, we do not believe, therefore, that the City Council meant to exempt The Sanitary District of Chicago. If such had been their intention, we believe they would have expressed their meaning more clearly.

We might add that there is now pending, in the Municipal Court of Chicago, a case (No. 208695) involving essentially the same question.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Leasing of Land Near Municipal Pier.

June 14, 1921.

HON. LOUIS B. ANDERSON, Alderman, 2nd Ward.

Dear Sir:

I have received your letter of June 11, 1921, in regard to the parcel of vacant land lying westerly of the Municipal Pier and southerly of Illinois street extended to the pier, which parcel has an east and west dimension of five hundred feet, more or less, and an average north and south dimension of 550 feet, more or less. In response to your request as to the city's right to sell or lease this land for warehouse purposes, I am of the opinion that the city has that right, subject, however, to the consent of the state.

According to Section 10 of an act of Congress, approved March 3, 1899, entitled, "An Act making appropriation for the construction, repair and preservation of certain public works, etc.," it is provided that it shall not be lawful to build any wharf, pier, or fill in or excavate, etc., in any port of the United States, etc., except on plans recommended by the chief of engineers and authorized by the secretary of war, etc., and in compliance with this section the City of Chicago, on September 11, 1913, obtained permission (Number 84425-24) from the secretary of war to fill in the lake in the place which made the land in question. This permit, however, does not purport to excuse the City of Chicago from obtaining permission from the state, but, on the contrary, Section 1 of the permit provides as follows:

“That it is to be understood that this authority does not give any property rights, * * *, nor does it obviate the necessity of obtaining state assent to the work authorized; as it merely expresses the assent of the Federal Government so far as concerns the public rights of navigation.”

Cummings v. Chicago, 188 U. S. 410.

There is no provision in the aforesaid permit which provides that the newly made land should be used for any particular purpose, but there is such a provision in the permit allowing the filling in of the land upon which the Municipal Pier stands, and the said provision is that the land or building thereon be not used for any other purposes except for harbor and commercial purposes. This provision has no effect upon the land in question, and, notwithstanding the fact that it be decided otherwise, it could still be leased, sold or used for warehouse purposes, because that use comes within the scope of the terms in the permit.

You state in your letter that a permit was obtained from the State of Illinois, but after a careful search I am unable to find it, and suggest that if you can locate same that you transmit it to me and I will be able to say whether or not the consent of the state is necessary for the contemplated lease or sale. I have come to the conclusion, however, that without this the consent is essential.

Therefore, I am of the opinion that the land can be sold or leased by the City of Chicago for the purpose set forth in your letter, subject to the consent by the State of Illinois, the latter, however, being unnecessary if the permit, which was supposedly granted by the state, provides to the contrary.

Yours very truly,

HARRY F. CHAVERIAT,
Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,
Acting Corporation Counsel.

**Ownership of Land Alongside New York Central Right
of Way.**

June 17, 1921.

HON. SAMUEL A. ETTETSON, Corporation Counsel.

Dear Sir:

The letter dated April 18, 1921, addressed to you and signed by Edward T. Glennon, assistant vice-president of the New York Central Railroad Company, in reference to the ownership of the ten-foot strip of land lying immediately east of the right of way of the New York Central Railroad Company and extending south from 22nd street to 25th street, and the fifteen-foot strip extending from the said ten-foot strip easterly between Lots 1, 2, 3 and 4 on the north, and Lot 5 on the south, in Block 3, in Uhlich and Muhlke's Addition to Chicago, together with an opinion dated April 8, 1902, addressed to this department, have been received by me, and after a careful examination of the subject-matter, I submit the following:

The ten-foot strip will be first considered.

On December 13, 1867, Uhlich and Muhlke caused to be recorded in the recorder's office of Cook County a plat of their addition to Chicago, which plat contains the ten-foot strip without any indication what it was to be used for; or whether it was dedicated to the City of Chicago or remained private property of the owners. It is difficult to ascertain and determine what kind of dedication, whether statutory or common law, if any at all, was intended, because all the records prior to 1871 have been destroyed by the Chicago fire. The statute provides, in effect, that the plat shall *particularly describe* and set forth all the streets, alleys, common or public grounds, giving the *names*, widths, courses and extent of all such streets and alleys, and that reference shall also be made upon the plat to some known and permanent monument, *et cetera*.

Hurd's Rev. Stat., Chapter 109, Sec. 1.

The above section of the statute was in effect at the time the plat was filed for record, and from an examination of the

copy of the old plat, the original having been destroyed by the Chicago fire (copies of which are in possession of the Map Department of the City of Chicago and the Chicago Title and Trust Co.) I find that there was no compliance with the statute, and hence it was not a statutory dedication.

Although the strip of land does not come within the meaning and intent of a statutory dedication by reason of the substantial defects in the plat, it might, nevertheless, be evidence of an intention of a common law dedication.

18 *Corpus Juris*, 42.

U. S. v. Illinois Central R. Co., 2 Biss. 174.

McMahon v. Borland, 262 Ill. 358.

Ryerson v. Chicago, 247 Ill. 185.

City of Chicago v. Drexel, 141 Ill. 89.

In the latter case the court held that there is evidence of an intention to make a common law dedication of property for street purposes where the owner of land subdivides it and makes, acknowledges, and records a plat of the subdivision designating thereon certain strips as streets or highways, though the plat is not made with the statutory requirements. As was already shown, there was no mark on the plat to show what the intent of the subdividers was.

The important matter to be considered in determining whether a common law dedication has been effected or not is the intention or design of the owner to dedicate.

City of Chicago v. Stinson, 124 Ill. 510.

There are a large number of cases which hold that various acts on the part of the owner are sufficient to indicate an intent to dedicate, but an investigation of these cases shows that in every case there was some specific act or acts to warrant the intention. The strongest case in point in favor of the city is that of *Smith v. Town of Flora*, 64 Ill. 93, where a railway company, before the laying out of a town, acquired the right of way through the tract of land on which the town was subsequently laid out. When the plat was made and filed for record strips of ground were left on each side of the right of way. On this vacant space, on each side of the right of way, lots, as platted, abutted. The plat was signed by the pro-

prietor and by his attorney in fact. At the time of the survey the proprietor declared that the reservation was for the use of the public, and the surveyor testified that it was the general understanding that the space was left for the benefit of the public. Numerous lots were sold with reference to the plat, and the houses erected generally had their fronts on the vacant ground. For ten years there was an acquiescence in the plat, and no taxes were paid by the original owners. The court held, that evidence of the *animus dedicandi* was clear and conclusive, and that persons claiming under the proprietor could not assert otherwise.

It clearly appeared from the evidence in the latter case that the owner declared that the reservation was for the public use, that various lots adjoining the strip were sold, that a number of houses were erected on the adjoining lots with their fronts on the vacant strip, and further, that the strips were used for a number of years by the public.

None of the aforesaid facts is present in the case at hand, and, where there is nothing beyond the form and location of the strips on the plat, the evidence is not strong enough to indicate a purpose in laying them out.

The cases of *City of Chicago v. Drexel*, *supra*, went so far as to hold that the evidence of an intent to make a common law dedication is not strong where the strips on a plat are not described as streets *and named*, and there is nothing beyond their form and location to indicate a purpose in laying them out. Another case of importance is *City of Chicago v. Hill*, 124 Ill. 646, where the court held, that a gas company having laid a gas pipe through a strip of land used for street purposes does not of itself establish an acquiescence on the part of the owner amounting to a dedication of the strip to the public for street purposes.

It might be contended in behalf of the city that the strip of land in question was not taxed, but, first of all, it is doubtful whether or not the strip was taxed, and, second, even if it had not been taxed, the failure to assess a private alley for taxation does not change its character to a public one.

City of Chicago v. Borden, 190 Ill. 430.

The case of *City of Belleville v. Stookey*, 23 Ill. 441, decided that the presumption of dedication is repelled where the owner had paid taxes on the land for twelve years.

It appears that the strip of land in question, until the time when permanent improvements were placed on a part thereof, was vacant and unoccupied, and mere acquiescence in the use of vacant and unoccupied land shows no intent.

Herhold v. City of Chicago, 108 Ill. 467.

Kyle v. Town of Logan, 87 Ill. 64.

Because of the fact that all which appears upon the face of the plat is a blank space, and there is nothing to show that the land covered by it has been devoted to a public use, I am of the opinion that there is not even a common law dedication of the ten-foot strip in question.

Poole v. Lake Forest, 238 Ill. 305.

Birge v. Centralia, 218 Ill. 503.

Thus far I have indicated that there is neither a statutory nor a common law dedication, but, although it be said that there is a common law dedication, the next and important question to consider is, was there an acceptance.

A dedication, whether statutory or common law, like a contract, consists of an offer and acceptance, and, subject to some exceptions, the general rule is well settled that a dedication is not binding and conclusive on either party until acceptance, proof of which must be unequivocal.

Hamilton v. Chicago, B. & O. R. Co., 124 Ill. 235.

Princeton v. Gustavson, 241 Ill. 566.

Earll v. City of Chicago, 136 Ill. 277.

Shields v. Ross, 158 Ill. 214.

Schmitz v. Village of Germantown, 31 Ill. App. 284.

Hewes v. Village of Crete, 175 Ill. 348.

In the latter case the court held, that notwithstanding the making, acknowledging and recording of a plat showing the streets intended to be dedicated, as required by statute, the fee does not vest in the municipality until acceptance.

Acceptance of a dedication as in the case of a deed, may be actual or constructive, express or implied.

Rose v. Elizabethtown, 275 Ill. 167.

Acceptance may be shown by acts or presumed from circumstances, but will not be presumed from mere execution of a plat.

Hamilton v. Chicago, B. & O. R. Co., 124 Ill. 235.

Littler v. City of Lincoln, 106 Ill. 353.

The case of *Illinois Insurance Co. v. Littlefield*, 67 Ill. 368, held that an alley set apart by a deed for the use of parties owning adjoining lands is not thereby dedicated to the city, where there is no proof that the supposed dedication was ever accepted by the public acting by the proper authorities. The reason for the rule requiring acceptance is that a municipality may not be required without their affirmative consent to improve and repair the dedicated property against the wishes of its proper officers and of a great majority of its people.

People ex rel. Schwartz v. Commissioner of Highway of Worth Township, 52 Ill. 498.

There may be an acceptance by the public by using the dedicated strip or by performing work thereon by public authorities.

Smith v. Town of Flora, 64 Ill. 93.

Maywood v. Village of Maywood, 118 Ill. 61.

Highway Commissioners of Rutland v. Highway Commissioner of Dayton, 60 Ill. 58.

The strip of land in question appears never to have been accepted by the City of Chicago, either by express acts or implied from surrounding circumstances.

On page two of the letter by Mr. Glennon he states that on March 19, 1878, Uhlich and Muhlke conveyed by quit claim deed to the predecessors of the New York Central Railroad Company the said ten and fifteen-foot strips of land. After an examination of the records in the recorder's office of Cook County I find this to be a fact. But, he continues:

“By virtue of said quit claim deed, together with exclusive use and enjoyment of said strips of land, uninterrupted and without objection, for upwards of forty years, the New York Central Railroad Company claims to be the owner of said strips in fee simple.”

Again, on page three, he states the following:

“* * * and the fact that they (the ten foot and fifteen foot strips of land in question) were sold by the original subdividers with the lots indicates that there was no intention to make a dedication.”

I am inclined to dissent from Mr. Glennon as to the latter statements, because if the city had acquired title to the strip or strips, the quit claim deed, or any other deed, would not deprive the city of its title. On the contrary, all that Uhlich and Muhlke conveyed to their grantee was that right which they had at that time, and if they had no right to the strips of land by reason of the city's acceptance, then their grantee in the quit claim deed obtained nothing.

Van Rensselaer v. Kearney, 11 Howard (U. S.) 297.

Harrison v. Boring, 44 Texas 255.

Subsequent grantees are estopped from denying a dedication through the acquiescence of their grantor, but it does not prevent them from denying the validity of a statutory dedication where the grantor only made a common law dedication.

Rees v. City of Chicago, 38 Ill. 322.

City of Alton v. Fishback, 181 Ill. 366.

However, the quit claim deed is, nevertheless, important for the proper conclusion of this opinion, not in so far that it conveyed any interest to the grantee, but that it showed a possible withdrawal of the offer of dedication, if there had been any offer at all, by the dedicators. The plat was recorded in the year 1867 and the deed is dated in the year 1878. There are only eleven years' difference between the date of recording the plat and the execution of the quit claim deed, but in all this time no conveyance appears to have taken place by the original owners, and for this reason it might fairly be assumed that up to that time there had not been any acceptance by the city, and by virtue of the said quit claim deed the original subdividers signified their intent to withdraw their offer, and also at the same time convey their interest to the predecessors of the New York Central Railroad Company.

That an offer to dedicate may be withdrawn prior to acceptance is clearly stated in the cases of *Littler v. City of Lin-*

coln, 106 Ill. 353, and *Forbes v. Bolenseifer*, 74 Ill. 183. It is true that a withdrawal by a part of the lot owners of dedication of part of the street adjoining their property is not allowed as against the right of other property owners, but at the time of the execution of the quit claim deed by Uhlich and Muhlke, both were the sole owners of all the property adjoining the strip of land in question. A case in point of law and fact is *City of Chicago v. Drexel*, *supra*, where it was held that before acceptance of a dedication by the public authorities the dedication is a mere offer which the owner of the land may revoke at any time, and his *conveyance* of the land so offered for street purposes before acceptance by the public authorities is a revocation of the offer to dedicate, and a later acceptance will not avail the public. In support of the latter decision reference is made to the following cases:

Doss v. Bunyan, 262 Ill. 101.

Birge v. Centralia, 218 Ill. 503.

Not only is a conveyance evidence of a withdrawal or revocation, but any act that applies the dedicated property to any use inconsistent with the purpose of the dedication, as, for instance, by devoting the property to the private use of the dedicator, or those claiming under him.

People's Gas Light, etc., Co. v. City of Chicago, 225 Ill. 612.

Another contention for the City of Chicago may be made by declaring that because the city accepted part of the streets and alleys in the subdivision—which it did—it also accepted the strip of land in question.

There have been several decisions in this state to the effect that an acceptance by the city of part of the street is an acceptance of all the streets in the subdivision, but the later and better authorities hold that an acceptance of part of the streets and alleys in a subdivision is not *ipso facto* an acceptance of all the streets and alleys.

Jordon v. City of Chenoa, 166 Ill. 530.

Reichert Milling Co. v. Freeburg, 217 Ill. 384.

Augusta v. Tyner, 197 Ill. 242.

Village of Lee v. Harris, 206 Ill. 428.

The court, in the latter case, said:

“It is insisted that an acceptance of some of the streets and alleys of a plat does not constitute an acceptance of the whole, and proofs of acceptance of a part is not sufficient to vest the village with right to use, possession and control of all the streets and alleys shown on the plat. We do not so understand the law, but, on the contrary, hold the true rule and doctrine to be that an acceptance by a city or village of some of the streets and alleys appearing on a plat is an acceptance of the entire system of streets and alleys so appearing, unless the intention to limit the acceptance is shown. In *Village of Augusta v. Tyner*, 197 Ill. 242, at page 246, we said:

“‘It is true that a street may be accepted in part and the remainder rejected, if it is proved that such was the intention of the public authorities. An acceptance of some of the streets named in a plat will not constitute an acceptance of the whole, if it is shown that there was an intention to limit the acceptance.’”

The reason for the rule is that the municipality should not be compelled to assume the burden that may be imposed by the compulsory acceptance of every part of offered dedication.

Moore v. City of Chicago, 261 Ill. 56.

For a proper conclusion of the subject-matter at hand I will further assume that there was an acceptance. The next question is, did the city lose its right, title or interest therein by not improving same or making use thereof, or because of the occupancy by the owners of the property adjoining the said strip for a period of about forty years? The law is well settled that prescription does not run against the right of the public to the use of land dedicated for such use.

Kelsoe v. Oglethorpe, 120 Ga. 951.

The same case held that the rights to the land dedicated may be relinquished by abandonment. A number of cases have held that where the dedicator, or those claiming under him, has occupied the land for a long period of time, it has a tendency to negative the acceptance of dedication by the public because these acts are inconsistent with the acceptance. The court, in these cases, I believe, is merely avoiding the use

of the word prescription and failed to lay down the correct theory.

There is a distinction between the cases where the statute of limitation is set up as a defense and where estoppel in equity is the ground for the city's lost title.

City of Belleville v. Stookey, 23 Ill. 441.

City of Carlinville v. Castle, 177 Ill. 105.

The latter case decided that the public right may be lost by abandonment for over twenty years on the principle of estoppel. Another case in point is *Jordon v. City of Chenoa*, *supra*, where the court held that while the statute of limitation does not run in favor of an individual against a municipality holding streets and alleys for the general public under acceptance of a dedication, yet the doctrine of equitable estoppel arising from abandonment and non-user may be invoked against it.

Lee v. Town of Mound Station, 118 Ill. 304.

The ten-foot strip of land appears to have been in the exclusive possession of the dedicators and those claiming under them for a period of almost a half century, and during this time they have placed on part of the strip various permanent improvements, and for this reason I find that the city would be estopped to assert its rights, if it had any to start with. I have made a personal investigation of the property in question and learned that the greater part of the ten-foot strip is occupied by permanent improvements, and hence the City of Chicago would be estopped to deny the right of title in the present owners.

A matter that may be mentioned here, but which is not necessary for the proper conclusion herein, is the fact that the ten-foot strip is, in my opinion, not of vital interest to the city, first, because of its narrowness; second, because it runs along the railroad track with no alley or street running either east or west therefrom, except the fifteen-foot strip to be considered in the next paragraph; and third, if there be any inconvenience or depreciation to the adjoining property by reason of the non-use of the said ten-foot strip, it would be to the sole injury of those who are asking for the opinion from this

department, namely, the New York Central Railroad Company, because, from an examination of the records in the recorder's office, it appears that the latter company is the owner of the said adjoining property.

CONCLUSION.

In Re the Ten-foot Strip.

Therefore, I find that there was no statutory dedication in the case of the ten-foot strip; that there was no common law dedication; that even though there had been a dedication there was no acceptance, or if there had been an apparent acceptance, of which there is no evidence, it was subsequent to the withdrawal of the offer to dedicate by virtue of the quit claim deed; and, finally, because of the various improvements thereon and the long period of continuous possession thereof by the owners of the adjoining property, the theory of equitable estoppel may be invoked. Hence, the city's "right" in reference to the said ten-foot strip is without foundation, and, consequently, it can not legitimately eject the present possessors or their grantees.

In Re the Fifteen-foot Strip.

The city's right in the fifteen-foot strip of land is almost analogous to that which it has in the ten-foot strip. The only different fact that exists in the fifteen-foot strip and does not exist in the ten-foot strip is that in the former case the strip is marked "alley" on the plat, whereas in the latter there is no mark or indication on the plat whatever. This at least indicates what the fifteen-foot strip was to be used for.

The only question to consider is, was there a dedication of the fifteen-foot strip, and if there was, whether it be a statutory or common law dedication?

For the same reasons as stated above, it is difficult to ascertain whether there was a dedication at all, but whatever doubt there may be, I am of the opinion that the doubt is favorable to the City of Chicago. When a plat contains the word "alley" it can be fairly assumed that the property was intended to be dedicated to the public. For this reason there evidently was at least a common law dedication. But, did the

City of Chicago accept the dedicated property? From all indications it did not, and regardless of the fact *whether* it be construed to be a *common law or statutory dedication*, it is imperative for the city to show its acceptance before it can establish any right or title to dedicated property.

Moore v. City of Chicago, 261 Ill. 56.

Heppes v. City of Chicago, 260 Ill. 506.

Iglehart v. Chicago, etc., R. Co., 241 Ill. 268.

Venice v. Madison Co. Ferry Co., 216 Ill. 345.

Owen v. Brookport, 208 Ill. 35.

In the case of *Moore v. City of Chicago, supra*, the court said:

“The making of a plat of a subdivision and filing the same for record is a mere offer on the part of the owner to dedicate the streets and other public grounds thereon designated to the public, and no title or rights vest in the public to such public grounds until there has been an acceptance; and until there has been an acceptance the offer to dedicate can be withdrawn and the plat cancelled.”

Therefore, for the same reasons that the ten-foot strip of land is private property, with the one exception above noted, I have reached the same conclusion in regard to the fifteen-foot strip, and hence find that the City of Chicago has not any right to either strip of land.

I am enclosing herewith the papers first above-mentioned.

Yours very truly,

HARRY F. CHAVERIAT,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

First Assistant Corporation Counsel.

Civil Service Status of Sergeants and Detective Sergeants.

June 18, 1921.

HON. LOUIS B. ANDERSON, Alderman Second Ward.

Dear Sir:

In response to your communication of recent date, wherein you ask to be advised concerning the present civil service

status of sergeants and detective sergeants, and whether the City Council would be justified in equalizing the salaries of these positions, we submit that:

In the absence of any statute to the contrary, it is solely within the province of the City Council to determine the salary attached to any position in the city classified service; and it is the exclusive function of the Civil Service Commission to determine the class and grade of any position in the city classified service.

Relative to any contention that the line and character of work incident to the position of detective sergeant differs from that incident to the position of sergeant, including patrol sergeants and desk sergeants, in the case of *People ex rel. Loftis v. Frazer et al.*, No. 24788, Appellate Court, the court in part said:

“It is conceded that patrol and desk sergeants are in the same line and character of work, and this notwithstanding the fact that each is employed in the performance of a distinctly different service in the department. The evidence shows that patrol sergeants and detective sergeants are generally employed on outside work in the investigation of crime and criminal complaints, while the desk sergeant’s work is the keeping of records and accounts within the police stations. There is some apparent detail difference in the work performed by detective sergeants and patrol sergeants, but we do not think that this difference is so marked as that between patrol and desk sergeants. * * *

“It is evident that the relator’s eligibility to an examination for a lieutenancy depends upon what construction is to be given to the phrase ‘in the same line or character of work.’ The evidence introduced on this question, we think, supports the conclusion of the trial judge. While there is some difference in the duties required of the different kinds of sergeants appropriated for, this difference is not of such character as would warrant a finding that each was engaged in a line or character of work different from that of the others.”

In harmony with the foregoing, we find that under the classification adopted by the Civil Service Commission, and now in force and effect, both of these positions are now included in the same division, class and grade as follows:

Branch IV.....Public Safety.
 Class S.....Police Service.
 Grade 4.....Assistant Chief of Police Operator.
 Assistant Identification Inspector.
 Detective Sergeants.
 Pound Master.
 Sergeant.

In view of the foregoing, it appears beyond doubt, that the position of sergeant and that of detective sergeant are in the same class and grade and that the duties incident to both positions are alike in character. Such being the case, we know of no legal reason why the salary incident to one should be different from that of the other.

It is solely within the province of the City Council to determine the salaries incident to these positions and in view of the foregoing decision in the Loftus case and what we have stated with respect to the classification and the character of the duties incident to the same, we are of the opinion that it would be legal and proper to equalize the salaries of these positions, and, in addition thereto, by making the salaries the same, it would eliminate what appears to be a distinction between such positions that is not warranted under either the present classification or the language of the court in the Loftus case.

Yours very truly,

HERVEY C. FOSTER,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Payment of Judges From Other Counties While Sitting in the Municipal Court.

June 28, 1921.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

Replying to your communication of the 24th instant, enclosing a notice from one William Richard Brand that he considers any payments to outside judges for services rendered

by them in the Municipal Court illegal, and will file a suit to prevent the same, we beg to state that, in our opinion, Mr. Brand's contention has no sound basis in law.

Section 13 of the Municipal Court Act reads as follows:

"13. That the judges of said Municipal Court may interchange with judges of other city courts, and with county judges, and said respective judges may hold court for each other and perform each other's duties when they find it necessary or convenient."

In passing upon this section, and sustaining its constitutionality, our Supreme Court said, in the case of *Am. Badge Co. v. Luna Park Improvement Association*, 246 Ill. 589:

"This provision of the Municipal Court Act is incident to or in a reasonable sense connected with and auxiliary to the subject indicated by the title. *If the dockets of the Municipal Court were overcrowded it would certainly tend to promote the administration of justice in that court to call in other judges* under the provision of said Section 13 to speedily dispose of the business of the court, thus preventing a denial of justice through long delay in the trial of causes. * * * A similar provision with reference to the exchange of city judges under the general City Court Act (Hurd's Stat. 1909, Sec. 6, p. 699), allowing judges of the city court to sit in the Circuit Court, has been held valid. *American Car Co. v. Hill*, 226 Ill. 227. * * *

"Manifestly, it was the intention that the mass of the work of the Municipal Court should be done by the judges elected under the provisions of the act creating that court, but it is just as manifest that *for the purpose of the reasonable dispatch of the business of the court other judges might be called in.*"

Other cases to the same effect are:

Gregory Printing Co. v. DeVoney, 257 Ill. 399.

People v. Fitzpatrick, 192 Ill. App. 125.

It being thus firmly settled that outside county and city court judges have authority to sit in the Municipal Court, if properly requested so to do, it would seem to follow as a matter of course that they are entitled to pay for their services, for, as our Supreme Court has expressed it, the public service would be greatly embarrassed and its efficiency impaired if the

public authorities could pay no salaries or other compensation to persons performing the duties of a public office.

People v. Schmidt, 281 Ill. 211.

But aside from this rule, the Municipal Court Act expressly confers upon the City Council the power of fixing the salaries of judges of the Municipal Court.

Municipal Court Act, Sec. 8.

Possibly Mr. Brand has in mind the case of *Hall v. Hamilton*, 74 Ill. 437, which contains an *obiter dictum* to the effect that circuit judges from outside counties are not entitled to additional compensation for holding court in Cook County, because Section 16 of Article 6 of the constitution forbids them to "receive any compensation perquisite or benefit, in any form whatever" than their fixed salary. But even if this *obiter dictum*, uttered nearly half a century ago, but apparently never repeated, were sound law as applied to circuit judges (which it now seems to be pretty generally conceded that it is not) it has no application whatever to municipal, county, or city court judges, for the constitution contains no such restrictions as to salaries or compensation to be paid to the latter class of judges.

For the reasons above stated, we are of the opinion that no just reason exists why the judges in question should not be paid the compensation promised them.

Yours very truly,

CARL J. APPELL,

Approved: *Assistant Corporation Counsel.*

SAMUEL A. ETTELSON,

Corporation Counsel.

Legality of Appropriation for Local Transportation Committee.

Chicago, July 8, 1921.

HON. WILLIAM HALE THOMPSON, Mayor.

Dear Sir:

You have asked our opinion as to the legality of the appropriation in the annual appropriation bill in favor of the Committee on Local Transportation which reads as follows:

“Expenditures for the following, under account 6-S to be reimbursed so far as the same legally may be done from the Traction Fund:

“For the employment of Engineers, Accountants, Appraisers, Legal Advisers, Clerks and such other persons, and for such incidental expense as may be necessary in the operation of the Committee (To be further accounted for 6-S under Standard Accounts as expended) \$25,000”

The item quoted is an entirety and must stand or fall as such. It can not be divided into parts, some of which might be legal while others would be illegal. Therefore it is sufficient to consider this item as an appropriation for the employment of “legal advisers.” If the employment of lawyers by the committee except through assignment by the corporation counsel is unlawful, then the whole appropriation fails.

Since in the annual appropriation bill appropriations are made for the Department of Law, and the item above quoted is in no way connected with that department, it is obvious that the purpose of this appropriation is to enable the Committee on Local Transportation to establish a department of its own whereby it may carry on its legal business independently of the Department of Law.

In considering this question, little if any weight can be given to there having previously been similar appropriations. Some other illegal appropriation can not operate to make this appropriation legal if in fact it is illegal.

To test the validity of a power it is proper to carry the claim of the right to exercise it to its ultimate consequences. When we do that in this instance and analyze the results, they are amazing. If the Committee on Local Transportation may be authorized by an appropriation to establish a Legal Department of its own, necessarily the City Council itself may do so. So may the Committee on Finance, or the Committee on Streets and Alleys, or the Committee on Public Health, or the Committee on Railroads, Industries and Compensation, or the Committee on Police and Municipal Courts, or the Committee on Public Markets, or the Committee on Judiciary, or the Committee on Buildings and Zoning, or the Committee on

Licenses, or any other committee. Indeed, if this appropriation is legal, the mayor, or the comptroller, or the chief of police, or the commissioner of public works, or the commissioner of health, or any other head of a department, could be authorized to establish a legal department of his own; and even individual aldermen could be authorized to do so.

The existence of such power is opposed to the theory of our municipal government. We have an independent Department of Law, the members of which are servants of the City of Chicago; and to them the other servants of the city should go for any legal assistance they may need. It is not contemplated in our scheme of government that the legal business for the city should be done by lawyers who are subservient to some head of a department, or some aldermen, or some aldermanic committee, or even the City Council.

The powers of the City Council are enumerated in Section 1 of Article V of Chapter 24 of the Revised Statutes; and therein will be found no authority for the City Council to make any appropriation for the purpose for which the appropriation under consideration is made.

On the contrary, Section 7 of Part Two of Article XII of the Cities and Villages Act, passed May 18, 1905, and relating to the City of Chicago, provides:

“The head of the Law Department of the city shall be the corporation counsel, and the duties heretofore performed by the city attorney shall be performed by the corporation counsel and his assistants. From and after the adoption of this act the office of city attorney shall be abolished.”

Even prior to the passage of the above mentioned section, the City Council had by ordinance lawfully provided for the appointment of a corporation counsel who was to be the head of the Law Department, and this section placed in the statutes a position which had already been lawfully created, and explicitly defined the duties of the office.

The ordinances of the City of Chicago, which have the effect of statutes within its limits, provide that the corporation counsel shall “conduct all the law business of the city.”

A mere reading of Sections 85, 86, 88, 89, 92, 93 and 94 of

Article I of Chapter V of The Chicago Code of 1911, ought to convince that the appropriations under consideration are unauthorized by law. Said sections read as follows:

“DEPARTMENT ESTABLISHED.) There is hereby established an executive department of the municipal government of the city which shall be known as the Department of Law and which shall embrace the corporation counsel and such number of assistants and clerks as the City Council may by ordinance provide; one of such assistants shall be known as the city attorney and another as the prosecuting attorney.

“OFFICE CREATED.) There is hereby created the office of corporation counsel. He shall be appointed by the mayor by and with the advice and consent of the City Council and shall be the head of the Law Department of the city.

“ASSISTANTS—APPOINTMENT AND REMOVAL.) The corporation counsel shall have the power of appointing and removing all or any of his assistants and clerks.

“DUTIES.) He shall superintend and with the assistance of the city attorney and prosecuting attorney conduct all the law business of the city.

“DRAFTS OF ORDINANCES.) The corporation counsel shall draft such ordinances as may be required of him by the City Council or by any committee thereof.

“CONTRACTS, DEEDS, ETC.) The corporation counsel shall draw any deeds, leases, contracts, or other papers required by the business of the city, when requested so to do by the mayor, the City Council, or the head of any department.

“LEGAL OPINIONS.) The corporation counsel shall, when required so to do, furnish written opinions upon subjects submitted to him by the mayor, the City Council or by the head of any department.”

This ordinance is now and for many years last past has been in full force. It has the effect of statutory law within the city. It has not been amended or repealed. It can not be amended or repealed by an appropriation in the annual appropriation bill in conflict with its terms and provisions.

By it an executive department known as the Department of Law is established; the office of corporation counsel is created and he is made the head of this department; he has the power of appointing and removing all his assistants; he is

required to act as the legal adviser of the City Council and its committees, and to draft ordinances, contracts and other legal documents for them, and to furnish them written opinions when requested; he is required to superintend, and with the assistance of the city attorney and prosecuting attorney, who are expressly made his assistants, to CONDUCT ALL THE LAW BUSINESS OF THE CITY.

Obviously, under this ordinance, attorneys and counselors outside and independent of the Department of Law can not be employed and paid with city funds to attend to law business of the city, and the City Council and its committees are by law bound to look to the corporation counsel as their legal adviser.

In making appropriations, the power of the City Council is as follows (R. S. Ch. 24; Art. V; Sec. 1; Clause 2):

“To appropriate money for *corporate purposes only*, and to provide for payment, debts and expenses of the corporation.”

An appropriation to employ lawyers in violation of the ordinance above referred to is not an appropriation for corporate purposes.

The City Council is the legislative branch of the municipal government; and it has only such powers as are conferred upon it by the statutes. No power is conferred or duty imposed upon it to “take care that the laws and ordinances are faithfully executed.”

The statute (Art. II, Ch. 24), among other things, provides (Sec. 1) that the chief executive officer of the city shall be the mayor, and (Sec. 10) that he shall perform all such duties as are or may be prescribed by law or by the city ordinances, and shall take care that the laws and ordinances are faithfully executed.

Article III of the constitution applies to our municipal government; and it reads as follows:

“The powers of the government of this state are divided into three distinct departments—the legislative, executive and judicial; and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.”

The City Council—the legislative branch of the municipal government—has no more power to control the executive branch in the discharge of its duties as defined by law than it has to control the municipal courts—the judicial branch of such government—in the discharge of their duties.

There would be precisely as much justification for the City Council to attempt to create itself or one of its committees into a court to decide cases as there is for the City Council attempting, directly or through some committee, to supersede the Department of Law or any other executive department and assume the exercise of the powers vested in and the discharge of the duties imposed upon such department. And any appropriation to provide the City Council or any committee thereof with funds to do such a thing is in violation of the law and void.

We will now call attention to some authorities in support of the foregoing:

Fergus v. Russel, 270 Ill. 304, is authority that the mayor can not split an item in the annual appropriation bill into parts and approve it in part and disapprove it in part; but he must approve such item *in toto* or disapprove it *in toto*.

Fergus v. Russel, *supra*, involved appropriations by the Legislature and the veto thereof by the governor; but the provision of the constitution applying to the governor in such case does not differ essentially from the provisions of the statute applying to the mayor in this case.

Thus, the constitution, so far as material (Art. V, Sec. 16), is as follows:

“Bills making appropriations of money out of the treasury shall specify the objects and purposes for which the same are made, and appropriate to them respectively their several amounts in distinct items and sections, and if the governor shall not approve any one or more of the items or sections contained in any bill, but shall approve the residue thereof, it shall become a law as to the residue in like manner as if he had signed it.”

The statute (Art. III, Sec. 18) relating to the veto of the mayor, so far as material, reads as follows:

“Such veto may extend to any one or more items or appropriations contained in any ordinance making an

appropriation, or to the entire ordinance; and in case the veto only extends to a part of such ordinance, the residue thereof shall take effect and be in force.”

The court, in *Fergus v. Russel* (270 Ill. at pages 348-349), said:

“The legislative branch of the government is vested with the discretion to determine the amount which should be appropriated for any particular object. The governor, as the chief executive of the state, is given the right to approve or disapprove of the action of the Legislature in making such an appropriation. He may disapprove of it for the reason that in his judgment no appropriation should be made for such a purpose, or for the reason that the amount appropriated is too large, or for any other reason satisfactory to him, but he has not the right to disapprove of a certain portion of an item appropriated and approve of the remainder, and thus perform a function which belongs exclusively to the legislative branch,—that of using the discretion necessary to determine the amount which should be appropriated for any particular object. It is no answer to this proposition to say that under the constitution the governor must return the bill to the assembly with his objections, and the assembly will then have an opportunity to pass the bill notwithstanding the disapproval of the governor, provided two-thirds of the members of each house vote to do so. The constitution contemplates that the governor shall approve or disapprove of an item *in toto*, and that the Legislature may then determine whether it shall adhere to its action or yield to the views of the governor and either abandon such appropriation entirely or enact new legislation on that subject. Under the contention of the governor the Legislature is given a choice, upon receipt of the veto message, not contemplated by the constitution,—that of passing the item partially disapproved over the veto of the governor or of accepting an appropriation it had not made and had not intended should be made. This would result in an invasion by the governor of the functions of the legislative department.”

That the division by the constitution of the powers of government into legislative, executive and judicial applies to our municipal government appears from the case of *People v. Olson*, 245 Ill. 288, in which our Supreme Court said, at page 293:

“Although the powers of government fall into the distinct departments of the legislative, executive and judicial, a municipal government embraces all of them. There is the legislative department, which ordains what the local laws shall be; the executive, charged with the duty of seeing that they are executed; and the courts, in which they are construed, applied and enforced.”

That the City Council can not authorize its committees or any of them to employ attorneys and counsellors outside of and independent of the Department of Law appears from the following authorities:

In 2 Dillon on Municipal Corporations (Fifth Edition), it is said, in Section 824, at pages 1244 and 1245:

“If the scheme of municipal government provides a *corporation counsel or city attorney or other legal officer* for the municipality whose duty it is to appear on behalf of the municipality *in all suits* by or against the corporation, and to conduct all the law business of the corporation, the municipality is deprived of its power to employ another attorney to take the place of and perform the duties which naturally belong to its law officer.”

In *Hope v. City of Alton*, 214 Ill. 102, our Supreme Court said, at pages 104 and 105:

“The ordinance set up in the special plea established a law department of the city and provided for the appointment of a corporation counsel charged with the duty of conducting the legal affairs of the city and prosecuting or defending suits, and provided that the city should not, in any case, be liable to pay for the legal services of any attorney except the corporation counsel or city attorney. The contract alleged by plaintiff, to pay him for services as an attorney, was therefore against the plain provision of the ordinance. The ordinance was binding not only on the City Council, but upon the plaintiff, and he was bound to take notice of its provisions when dealing with the city. (21 Am. & Eng. Ency. of Law., 2d ed., 997.) The ordinance was a part of the Revised Ordinances of 1889, and was a local law of the municipality. Where an ordinance is passed by a city council within the legislative power conferred by the charter, it has the same force and effect within the corporate limits as a law passed by the Legislature. (*Mason v. City of Shawneetown*, 77 Ill. 533; *Tudor v. Rapid Transit Railroad Co.* 154 *id.* 129;

21 Am. & Eng. Ency. of Law, 2d ed., 96.) The ordinance did not prescribe a mere rule of procedure for the City Council, which it could disregard at pleasure but it was a binding law of the city, duly passed in the exercise of powers conferred by the charter. A municipal corporation which may sue and be sued or which has legal business to transact, unless restrained by its charter, may employ attorneys to conduct such business. (1 Smith Mun. Corp., Sec. 178.) But where, by ordinance, a law department is created, with a corporation counsel charged with the duty to perform such legal services as may be required by the city, with a provision that the city shall not be liable to pay for legal services of any other attorney, any contract made by the City Council in violation of the ordinance is without authority and void.”

In *Rafael v. Boyle*, 31 Cal. App. 623, the court, on pages 624 to 626, said:

“The sole question presented for determination is whether or not under these facts the Civil Service Commission has the power to retain an attorney at the expense of the city when the city attorney was ready and willing to perform the necessary legal services. It is contended by the respondent that under the broad provisions of Article XIII of the charter of the city and county of San Francisco, the right to retain counsel other than the city attorney is incidental to the very nature and life of the civil service system as therein created.

“Nowhere in the charter is express power conferred upon the Civil Service Commission to engage private counsel, but it is insisted by petitioner that this power is implied in Section 20, Article XIII of that instrument, providing that the commission shall have power ‘to institute and prosecute legal proceedings for violation of any of the provisions of this article.’ We are of the opinion that such contention can not be maintained.

“Whether attorneys may be employed in behalf of a municipal corporation depends upon the proper construction of the law under which such employment is sought to be sustained, the nature of the service to be performed, or, in the absence of legal provisions pertaining thereto, the character of the litigation or legal controversy involved. There is much variety in the charters and statutes of different jurisdictions relating to law officers of municipal corporations. In general, unless forbidden by law, when necessity arises therefor and the

interests of the municipal corporation require it, the employment of attorneys has usually been sanctioned. (2 McQuillin on Municipal Corporations, Sec. 501.) It is usual, however, to find in municipal charters or laws applicable to the government of local public corporations, provisions dealing with the conduct of the municipality's legal business. Such is the case in the charter of San Francisco, which provides for a legal department, the head of which is known as the city attorney, and whose duties are set forth in Article V, Chapter 2, as follows: 'He must prosecute and defend for the city and county all actions at law or in equity, and all special proceedings for or against the city and county; and whenever any cause of action at law or in equity or by special proceedings exists in favor of the city and county he shall commence the same when within his knowledge, and, if not within his knowledge, when directed to do so by resolution of the board of supervisors. He shall give legal advice in writing to all officers, boards, and commissioners named in this charter, when requested so to do by them, or either of them in writing, upon questions arising in their separate departments involving the rights or liabilities of the city and county. He shall not settle or dismiss any litigation for or against the city and county under his control unless upon his written recommendation he is ordered to do so by the mayor and supervisors.'

"This express provision clearly indicates an intention that the city attorney should handle all the legal work of the various departments of the city government, except where special provision is made for additional counsel. The manifest intention of the framers of the charter in the adoption of this provision was to systematize the conduct of the city's legal business, and to limit the power of the authorities to incur expenditures for this character of service; and the mere power given the commission to institute and prosecute legal proceedings does not imply that this above-quoted provision of the charter should be inoperative with regard to the Civil Service Commission so as to empower it to employ another attorney to perform the duties belonging to the law officer of the municipality. The charter having provided a city attorney upon whom the board can call when a defense to any suit is necessary, it by implication makes it incumbent upon the board to avail itself of his services, and it can not ignore this provision and employ some other attorney to render those services which it is the duty of

the city attorney to perform. (*Denman v. Webster*, 139 Cal. 452, 73 Pac. 139; *Merriam v. Barnum*, 116 Cal. 619, 48 Pac. 727.)”

In *Collins et al. v. Board of Street Commissioners*, 70 Hun. 583 (N. Y.), it was held that where authority was vested in the trustees of the Village of Saratoga Springs to employ an attorney for the village, such power was exclusive, and no other village board or official has power to employ other attorneys, and no attorney except the one thus regularly employed could represent the village or any board or officer thereof.

In *Valentine Clark Co. v. Allegheny City*, 143 Fed. 644, it was held that the city solicitor was the duly appointed representative of the municipality in legal affairs, and that “it would result in great confusion if other officials could intervene and interfere as they saw fit in the conduct of a case committed to his care.”

In *State v. Sinking Fund Commissioners*, 10 N. J. L. 219, the Supreme Court of New Jersey held that a sinking fund commission was not an independent municipal organization, but a department of the city government; and with respect to the power of the commission to employ counsel outside of the department of law of the city the court said, on page 220:

“That section of the city charter providing for the appointment of a city counsel strengthens the above opinion. The charter provides for the appointment of city officers and provides for a complete system. Among them it includes a city counsel, and defines his duties. The duties of the city counsel are to do the general law business of the city and to advise all city officials and departments as to law matters, and the law also fixes his salary, and says that he shall receive no fees of any kind for his work. If the commissioners required legal advice it was the duty of the city counsel to give it and be responsible for it.”

In *Rawson v. The Mayor*, 4 Abb. Pr. (New York Supreme Court) 342, the Board of Aldermen of the City of New York resolved to institute an investigation into the affairs of the police department, and appointed a committee to conduct

the investigation. Several witnesses declined to answer questions, and the committee instituted proceedings to compel them to answer. The counsel for the corporation was not employed or appointed to conduct these proceedings; but the special committee employed such counsel as were agreeable to them for that purpose. The question involved was whether the city was liable for the fees of these counsel. In holding that the city was not liable the court said, at pages 343 to 345:

“No question is made in this cause as to the rendition of the services of the plaintiff’s assignor, or the reasonableness of the charges therefor. The simple question presented is, can the corporation be made liable for this claim?

“Section 18 of the charter of 1849, organized an executive department, to be known as the ‘Law Department,’ ‘which shall have charge of and conduct all the law business of the corporation and of the departments thereof, and all other law business in which the city shall be interested, when so ordered by the corporation.’

“By the city charter, therefore, the counsel to the corporation is ‘to have charge of and conduct,’ not only all the law business of the corporation, but all the law business of the several departments of the corporation. These provisions apply to all cases in which the corporation or any of its departments have any law business to be transacted. In addition to this, the counsel is also to have charge of and conduct ‘all other law business in which the city shall be interested, when so ordered by the corporation.’ The application of this latter provision and the reasons for its enactment are familiar with all who have had any practical knowledge of the affairs of the city government. Many suits, proceedings, and cases are constantly instituted, in which neither the corporation nor any of the departments are parties. But the question to be decided may be such as to affect the property or rights of the corporation or some of its officers. Previous to the charter of 1849, such suits were defended or prosecuted by counsel employed by the immediate parties to the action, and frequent calls were made upon the city treasury for their payment, on the ground that the corporation was interested in the suit or in its result. The intent of the charter of 1849 was to place all legal business in the control and under the management of the corporation counsel, in the result of which the corporation might

have any interest, and for the expense of which it might by any possibility be called on for payment. It was in reference to this class of cases that the counsel to the corporation was to take charge of and conduct, whenever required so to do by the corporation, all law business in which it had any interest. It is quite manifest that it was the intention of the provisions of the charter and the ordinances that all the law business of the corporation, or of its departments, or in which the corporation should deem it had any interest, should be conducted by and placed in the charge of the counsel to the corporation. For these services a specific salary is given to that officer—such as was deemed an adequate and reasonable compensation therefor. These services he is bound to render, and must do so for the compensation allowed. It is in the power of the Common Council to alter and graduate this compensation from time to time in reference to the services rendered; but I can find no authority for it to withdraw and place in other hands duties which the charter has confided to him, and which he, by his oath of office and every obligation resting upon a public officer, is bound to discharge.

“The counsel is not only required to take charge of and conduct all the law business of the corporation, but all the law business of the several departments thereof. The powers of the corporation of this city are divided into legislative and executive. The legislative powers are vested in a board of aldermen and board of councilmen, who, together, form the Common Council of this city. These two bodies, therefore, form the legislative department of the city government, and are as much subject to the provisions of the charter as the executive department. The powers of the latter are vested in the mayor and the heads of the several departments created by that charter, and each moves in its allotted sphere, subject to the restraints of their common constitutional superior, the charter of the city. It is, therefore, quite apparent that the counsel to the corporation has confided to him, and it is made his duty to conduct, as well all the law business of the legislative department of the corporation, or either branch of it, as to conduct the law business of the several executive departments, and their several branches and subdivisions; and it is not easy to see how it is competent for the legislative department, or any of its committees or agents, to pass by the law officer selected by the people, and charged by the charter with these duties,

and select and appoint other counsel. If it can be done, it may be equally competent for each of the executive departments and their several subordinates to do the same thing.

"This certainly would present an anomalous state of affairs. Each department might thus have its own law officer, subjecting the city treasury to enormous drains, while the legally and duly selected law officer of the city, to whom is given a salary for the discharge of these duties, who has an office and clerks provided for at the public expense, to enable him the more readily to discharge them, may be sitting idly in his office, and receiving this compensation without rendering any equivalent. I am quite sure that no such state of things can be allowed under the charter, or that there can be any serious doubts that it can not be permitted.

"If the duties of the counsel prescribed by the charter can be taken away from him and confided to others by the Common Council, or either board, or by any committee thereof, why may not the same thing be done to those of the mayor, comptroller, or any head of any other department? The simple statement of the proposition carries with it its refutation. If it, however, can be done in the one case it certainly can in the other. Section 19 of the charter of 1849 authorizes the Common Council to establish such other departments and bureaus as they may deem the public may require, and to assign to them and those offices therein created such duties as they may direct, *not inconsistent with this act*.

"This provision is a clear legislative restriction on the power of the Common Council to withdraw any duties confided by the charter to any particular department or bureau, and devolve the same upon any other department or bureau then existing or thereafter to be created.

"So long as these plain and unmistakable provisions of the charter continue in force, I can have no doubt that they must be conformed to."

The foregoing opinion also applies to the ordinance passed by the City Council on the 28th day of June, 1921 (Council Journal, page 692), purporting to employ Louis E. Hart and Lawrence A. Cohen as special counsel to represent the city's interests in all matters relating to and growing out of the matter of rates of compensation heretofore paid to real estate experts, building experts and other experts em-

ployed in connection with street improvement bond fund matters and other matters involving the employment of experts by the City of Chicago, with full power and authority to make all necessary investigations and to institute such proceedings as may be necessary in the premises. Such ordinance is in violation of law.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**The Application of McCabe and Rush for Pensions as
Dependent Parents.**

July 12, 1921.

TO THE BOARD OF TRUSTEES OF THE
POLICE PENSION FUND.

Gentlemen:

Replying to your request for an opinion as to whether or not the above applicants are entitled, under the law, to receive a pension as the dependent parents of deceased firemen, I desire to advise you that Section 6 of the Firemen's Pension Act of the State of Illinois provides, in part, as follows:

“If the deceased fireman shall leave no widow or natural child or children surviving him but shall leave a dependent natural father or mother, then said Board of Trustees shall direct the payment from said pension fund to such dependent father or mother the sum of twenty-five dollars each month, provided it shall be proven that the deceased fireman at the time of his death was the sole or only support of such parent or parents.”

The question of dependency is one of fact and must be determined by the board in each case where an application is filed for a pension under the terms and provisions of the above section of the statute.

In order to properly interpret the above section of the statute it is necessary to take into consideration the object for

which the statute was enacted and the purpose for which it was intended.

At the time of the enactment of the above provision of the statute, I am sure it will be conceded by everyone, it was represented to the public and to the members of the General Assembly that a large number of firemen were single men, living with their parents, and that, upon their death, the parents of the said class of firemen were left, in many cases, without any means of support.

It is my opinion that, if an application for a pension is filed by the parent or parents of a deceased fireman and it is proven to the satisfaction of the board that at the time of the death of the fireman he was residing with his parent or parents and contributing all or a considerable portion of his salary as a fireman for the purpose of maintaining a home for his parent or parents and supplying them with the necessities of life, in the absence of proof that the said parent or parents were not dependent upon the amount of money contributed by the said fireman for their maintenance, they come within the purview of the statute and are dependent parents. In my opinion it is immaterial whether or not the parent or parents may have other children living upon whom they might make a demand for support.

Yours truly,

JAMES W. BREEN,
Acting Corporation Counsel.

Refund of Cigarette License Fee.

July 12, 1921.

HON. JOHN A. RICHERT, Chairman Finance Committee.

Dear Sir:

In your letter of June 5, 1921, your committee requested an opinion as to the right of the city to make a refund of \$100.00, the same having been paid for a cigarette license obtained by Manos & Britsakis, at 3959 N. Ashland avenue, Chicago.

There is no doubt that where a person, in the absence of

fraud or mistake and without compulsion of the person or goods, and not under protest, pays a license fee to the city, he can not afterwards recover it back. This rule holds good even where the ordinance, by virtue of which the license fee was required, is found invalid.

City of Chicago v. Klinert, 94 Ill. App. 524, and
Holden v. City of Galena, 19 Ill. App. 409.

The policy of the City of Chicago in regard to rebate or refund of any license fee or part thereof is shown by Section 1516 of The Chicago Code of 1911, the second paragraph of which reads as follows:

“In no event shall any rebate or refund be made of any license fee or part thereof by reason of the death of the licensee or by reason of non-user of such license or by reason of a change of location or occupation of such licensee.”

This case clearly comes under the policy shown by the above section, as it is a request for a refund merely by reason of non-user of the license.

I would therefore advise you that there is no cause for refund of the licensee fee or any portion thereof.

Yours very truly,
THADDEUS F. KUFLEWSKI,
Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,
Acting Corporation Counsel.

Payment of Voucher for Special Counsel.

July 14, 1921.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

The auditor has submitted to us copy of a voucher prepared for the Committee on Harbors, Wharves and Bridges, which is in his possession. This voucher directs the payment of \$1,500.00 to Benton F. Kleeman, for legal services rendered from January 1, 1921, to June 20, 1921, in the matter

of preparing for trial on Lake Calumet Boundary Line Agreements in connection with the work of Arend Van Vlissingen; preparing suits in Circuit Court; preparing ordinance adopting plan of Lake Calumet improvement; preparing legislative act turning over to the city all lands to be reclaimed in Lake Calumet; and passing on ordinances in re Boundary Line Agreements.

This voucher is drawn against the fund designated as 478-X-4, which authorizes the employment of engineers, experts, legal advisers, stenographers and other persons, and the payment of incidental expenses that may be necessary to acquire and perfect title to land required for the building of an inner harbor at Lake Calumet, such amount to be expended under the direction of the Committee on Harbors, Wharves and Bridges. The appropriation is for \$12,934.80, and apparently the voucher is in good form.

The question raised by the auditor was, whether it was proper to pay this amount to Mr. Kleeman on account of his connection with the corporation counsel's office, the same being somewhat in the nature of an extra or special compensation to him in addition to his salary.

The City Council had the matter under consideration, and, on the same day that it passed the annual appropriation bill, passed an order authorizing and directing the city comptroller and the city treasurer to pass for payment the voucher in question. (See Council Journal, June 28, 1921, p. 694.)

While there might have been some doubt as to the propriety of the payment in the absence of the council order last mentioned, we are of the opinion that this order grants the necessary authority, and that it will be lawful to pay the said voucher. It is a well established principle of law that legislative acts performed on the same day by any legislative body, where same are *in pari materia*, that it to say where they relate to the same subject-matter, must be construed together as part of the same legislative act, unless it is absolutely clear that it is the intention of the legislative body to nullify one by the provisions of the other. It is true that the order has not the same dignity as the ordinance, but, nevertheless, the order

having been passed at the same time, it will be construed by the courts, if it should come to a question that must be litigated, that the order is interpretative and shows the intention of the City Council with reference to the expenditure of the fund appropriated to the Committee on Harbors, Wharves and Bridges. Such being the case, it amounts to authorizing that amount (\$1,500.00) as additional salary to Mr. Kleeman.

There is no law which compels an appropriation for a salary to be made in one sum. The City Council, if it sees fit, may divide a person's salary so that a part will be paid from one fund and a part from another. It having been so divided and the council having authorized the additional payment in the present instance, we can see no reason why payment of the said voucher should be withheld.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Status of Secretaries for Aldermen.

July 19, 1921.

HON. CHARLES E. FRAZIER, President Civil Service Commission.

Dear Sir:

We herewith transmit a communication from James T. Igoe, City Clerk, dated July 8, 1921, requesting the approval of the temporary appointment of thirty-two secretaries to aldermen, to date from July 1, 1921. The Civil Service Rule pertaining to temporary appointment made prior to the approval thereof by the commission, provides that the appointing officer shall show the necessity to make such temporary appointment prior to such approval. You will note that the aforesaid request fails to set forth any facts which would constitute an emergency within the meaning of the rule pertaining to temporary appointment made prior to the approval

thereof by the commission, nor does it set forth any facts from which it would appear that the temporary appointment of such secretaries is necessary "to prevent the stoppage of public business, or to meet extraordinary exigencies."

In the case of *People ex rel. Roderick v. the City of Chicago*, 283 Ill. 462, the court held, in substance, that where the City Council created a position its action in so doing determined the necessity for the services incident to such positions; and that the filling of a vacancy therein was not discretionary. That is to say, it is the province of the City Council to determine whether or not a certain position is necessary, and having so determined by its action in creating the same, the appointing officer must fill the same pursuant to law. In view of the foregoing, it would appear that the responsibility of determining whether or not the services of such secretaries are necessary rests upon the City Council, and the City Council by having created such positions, has established the necessity for the same. But whether the necessity for such services is sufficiently urgent to come within the meaning of the provisions of Section 10 of the Civil Service Law pertaining to temporary appointment, is an entirely different question.

We are advised that there is no appropriate eligible list for such positions. That fact, we believe, has a tendency to modify the legal restrictions upon the right to make temporary appointment. But while we believe that the lack of an appropriate eligible list for a certain position would give the Commission the right to approve of temporary appointment to such position upon a showing that would not suffice in the face of an existing eligible list for the same, we further believe that the absence of an appropriate eligible list would not deprive the Commission of its discretionary right to determine whether temporary appointment to such position, pending the creation of an eligible list, is of such character as would come within the meaning of the law.

Therefore, inasmuch as the City Council, by its action in creating the positions, has determined the necessity for the services of such secretaries, and there is no eligible list appropriate to such positions, we are of the opinion that upon

being advised by the city clerk or the respective aldermen for whose use and assistance such secretaries were provided, that the necessity for the services of such secretaries, as evidenced by the action of the City Council in creating the positions, existed on July 1, 1921, and that the necessity therefor is a continuous one without date, the Commission would be warranted in approving of the temporary appointment of such secretaries for and during such reasonable period of time as is required to establish an eligible list appropriate to the same.

Yours very truly,

H. C. FOSTER,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Validity of Council Order Directing the Laying of a Water Main.

July 20, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

I have received your letter of June 23, 1921, in reference to your authority in carrying out the Council order passed by the City Council on June 17, 1921, page 431, directing the laying of a water main in Kedzie avenue, from Columbus avenue to 81st street, and in response to your request I submit the following:

From the facts presented herewith it does not appear that there was a dedication but merely the fact that the space known as Kedzie avenue was used by the public as a street. It is not clear that there was no common law dedication, still, in view of the fact that the street has been used as such by the public generally, a dedication may properly arise through a technical estoppel.

City of Ottawa v. Yentzer, 160 Ill. 509.

City of Chicago v. Hill et al., 124 Ill. 646.

The court held in the latter case that the fencing out of a strip of land by the owner affords strong evidence of its

being left out for a street, and, without countervailing evidence, might be accepted as satisfactory proof of dedication.

In the case of *Kelly v. City of Chicago*, 48 Ill. 388, the court decided that before a title can be divested by dedication the proof must be very satisfactory either of an actual intention to dedicate, or of *such acts* or declarations as should equitably estop the owner from denying such intention. In the case of *City of Chicago v. Stinson*, 124 Ill. 510, the court held in part as follows:

“Long use and long acquiescence in such use by the owner of land are sometimes regarded as, in and of themselves, evidence of a dedication.”

It is further stated in your letter that the street has been used as a street for a number of years but does not state how many years. The weight of authority is that the estoppel raised for the purpose of an implied dedication does not depend upon the length of time for which the property has been used.

Princeton College v. Princeton, 7 Ky. Op. 121.

A dedication, whether statutory or common law, or implied by estoppel, must be accepted by the municipality, and until such acceptance, is not binding on either party.

Phillips v. Leininger, 280 Ill. 132.

Rose v. Elizabethtown, 275 Ill. 167.

Hillmer v. Behr, 264 Ill. 568.

But there is no doubt as to the city's acceptance, because the lines of poles carrying the utility wires and the sewer, are sufficient to evidence an acceptance.

Winthrop Harbor v. Gurdes, 257 Ill. 597.

Kimball v. Chicago, 253 Ill. 105.

Lowery v. Pekin, 210 Ill. 575.

Although the aforesaid improvements had not been made, there would, nevertheless, be an acceptance, by reason of the fact that the City Council passed an order directing a water main to be laid, which in itself is *prima facie* evidence of an acceptance.

Steinacker v. Gast, 28 Ky. L. 573.

Bloomfield v. Allen, 141 S. W. 400.

Therefore, I am of the opinion that it will be within your power to carry out the council order directing the laying of a water main in that part of Kedzie avenue as above described.

Yours very truly,

HARRY F. CHAVERIAT,

Assistant Corporation Counsel.

Approved :

JAMES W. BREEN,

Acting Corporation Counsel.

Operation of Amusements in Waters of Lake Michigan.

July 23, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

I have received your letter of July 15, 1921, in reference to the necessity of the Marine Amusement Company obtaining a license from the City of Chicago for operating two sea swings in the waters of Lake Michigan at Wilson Beach, and after a careful examination of the license law I am of the opinion that a license is necessary, notwithstanding the fact that the city had previously granted a permit for the operation of said swings.

The permit heretofore granted was merely for the purpose of giving to the said amusement company a right to install two swings in the waters of Lake Michigan, and, under the same permit a right to operate them without a license, providing, however, no fee be charged for the use of said sea swings. In other words, the erection and use of the swings is no violation of the city's right so long as no fee is paid for the use thereof, but when a fee is derived, then the license law enters, and in addition to the permit to operate the swings a license must be obtained in order to allow the charging of a fee.

The power to license said swings is clearly indicated in Section 106 of The Chicago Code of 1911, which provides as follows:

“18th Class. All entertainments operated by motive power other than animal power, including devices, ap-

paratus, attractions and amusements for the transportation of persons.”

The amount of the license fee to be exacted is found in Section 110, under 18th Class, which reads in part as follows:

“* * * \$5.00 a week for each of such entertainments where the fee fixed or fare charged for a ride thereon exceeds 5c but does not exceed 10c; * * *”

As appears in your letter, the fee charged by said amusement company is ten cents plus war tax, and hence comes within that part of the 18th Class that requires a fee of \$5.00 per week. Therefore, there being two swings and the season about ten weeks, the license fee should be \$100.

Yours very truly,

HARRY F. CHAVERIAT,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Jurisdiction of City at Maxwell Street Market.

July 26, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

We are in receipt of your communication of July 15, 1921, advising us that an ordinance was passed by the City Council on July 22, 1912, creating a public market in the roadway of Maxwell street from the west line of South Jefferson street to the east line of South Halsted street, which market was extended from the west line of South Halsted street to the east line of South Sangamon street under an ordinance passed by the City Council December 28, 1916, and requesting us to advise you as to who has the power to enforce the provisions of these ordinances, and also what rights the commissioner of public works has in the sidewalk space and the roadway of said market.

In reply, we beg leave to advise you that the ordinance creating the public market on Maxwell Street also created the

office of Superintendent of the Maxwell Street market, and provided that he shall be appointed by the mayor with the advice and consent of the City Council.

Section 4 of the ordinance provides as follows:

“It shall be lawful for the market superintendent, and it is hereby made his duty, to see that the ordinances regulating the sale of poultry, meats, fish, fruit, vegetables and all other foodstuffs, and all ordinances regulating the sale of any merchandise dealt in at such market, and also that the ordinances regulating the market, be observed, and that all persons therein conduct themselves in a peaceable and orderly manner, and to arrest or cause to be arrested and taken before a judge of the Municipal Court every person who shall fail to observe, or who shall violate the ordinances regulating the market, or who shall disobey the lawful directions of the market superintendent or conduct himself in a disorderly manner in said market.”

Section 6 provides that no wagon, push cart, truck or any other vehicle or stand used for the sale of goods on such market shall be placed in such a manner as to obstruct the traffic in the middle of the street, and that it shall be the duty of the market superintendent to keep open and clear sufficient space in the center of said street for traffic, as may be necessary from time to time, and that it shall likewise be unlawful for any such vehicle or stand to obstruct any street crossing.

From an examination of the entire ordinance, it is our opinion that it was the intention of the City Council when it created the Maxwell Street market by ordinance, and provided therein for the creation of the office of the Superintendent of the Maxwell Street market, that the said superintendent should be charged with the responsibility of enforcing all the provisions of the ordinances of the City of Chicago regulating the said market and the sale of goods and merchandise within the area designated in the ordinances as a public market.

It is our opinion that the Commissioner of Public Works has no power or authority to interfere with the management and operation of said market. The ordinance expressly makes it the duty of the market superintendent to keep open and clear sufficient space in the center of the street for traffic as

may be necessary from time to time, and, that power, being expressly conferred upon the market superintendent, clearly indicates to me that the City Council intended to place the full responsibility for the proper conduct of the Maxwell Street market upon the market superintendent.

In regard to the sidewalk space of said market, I do not find any provision in the ordinance or any of the amendments thereto referring to sidewalk space, and there does not appear to be any provision making the sidewalk space a part of the market, as the ordinance appears to limit the area of the market from curb line to curb line.

It is our opinion that the Commissioner of Public Works has jurisdiction over the sidewalk adjacent to the market, but at the same time it is not unreasonable to conclude that where the City Council creates a public market it must be implied that the patrons of said market have a right to use the sidewalk for the purpose of gaining access to said market for an opportunity to buy or sell, and that the City Council so intended at the time of the passage of the ordinance. The Commissioner of Public Works, in exercising his jurisdiction over sidewalks adjacent to public markets, must take that fact into consideration.

If you have in your possession any specific complaints in regard to the violation of the ordinances of the city on the sidewalk adjacent to the Maxwell Street market, I would be pleased to have you forward them to me in order that I may be in possession of all the facts that you desire to be advised on.

Yours very truly,
JAMES W. BREEN,

Acting Corporation Counsel.

Withdrawal of Reserve Contrary to Provisions of Contract.

August 2, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

We have your request for an opinion from the corporation counsel relative to the legality of granting the request

of the Ketler-Elliott Erection Co. for permission to withdraw \$50,000 from the 15 per cent reserve, on account of their contract for the erection of the Wells Street bridge, they having already been paid, in accordance with the contract, 85 per cent of the value of the work completed. We note from your letter that the 15 per cent, which, according to the contract, is to be held back by the city until the final completion and acceptance of the bridge, now amounts to over \$72,000.

While it may seem that \$72,000 is a large sum of money to lie idle, and while we appreciate that the company could, no doubt, use \$50,000 to advantage, yet consideration should also be given to the fact that an unauthorized payment might render you personally liable.

The law of this state requires that all contracts of this character shall be awarded to the lowest responsible bidder, after proper advertising of the terms of bidding.

That has been done in this case. One of the terms specifically advertised was the manner of payment, namely, that as the work progressed, 85 per cent of the value of the work completed and certified by the engineer, should be paid, the remaining 15 per cent to be held in reserve until the final completion and acceptance of the work. On this condition the Ketler-Elliott Erection Co. made its bid. On the same condition other contractors made—or were deterred from making—their bids. It can hardly be said that this was an immaterial detail which it would be within the discretion of the Commissioner of Public Works to waive or ignore. It appears to us to be a very material part of the terms under which the contract was let. The prospect of tying up \$72,000 for a long period of time may have been the very thing that deterred other contractors from bidding on this job, or, at any rate, from making a lower bid than the Ketler-Elliott Co. Good faith would preclude the city from now paying said company more than their bid calls for. (And allowing them the use of \$50,000 for a considerable time before they are entitled to the same would be one way of paying them more than their bid calls for.) Such a course would not only be a

fraud upon other bidders or prospective bidders, but it would also fail to comply with the statute. Our courts are opposed to any evasions of the law that contracts of this character should be let to the lowest responsible bidder and enforced as made.

Pells v. City of Paxton, 176 Ill. 318.

L. S. & M. S. Ry. Co. v. Chicago, 144 Ill. 391.

If the city attempts to pay out money in violation of this rule, a taxpayer can stop it by injunction proceedings.

Littler v. Jayne, 124 Ill. 123.

There is a further objection to the proposed payment. The \$72,000 held in reserve is that much security held by the city, in case the bridge should before final acceptance be found to be in any manner defective, or in case the company should for any cause refuse or fail to complete the bridge, thereby requiring the city to have it completed by some other contract, at perhaps considerably greater expense. The company, has given a bond, with surety for the satisfactory completion of the work. Now if the city surrenders \$50,000 of this security, it will thereby increase the risk of the surety on the bond exactly \$50,000. To make such an agreement without the consent of the surety, would, under well settled rules of law, have the effect of absolutely releasing the surety from all liability on the bond.

City of Chicago v. Agnew, 264 Ill. 288.

We are, therefore, of the opinion: (1) that a payment before the time specified in the contract would amount to a *gratuity*, which a city has no power to grant; and (2) that payment on different terms than those specified in the contract (or otherwise changing the terms of the contract) would *release the surety* on the bond given by the Ketler-Elliott Erection Co.

Since receiving your letter, however, we have been informed that the delay in the completion of the structure is due largely, if not entirely, to the fault of the city. This, no doubt, disposes of the first objection, above made, namely that a further payment prior to final completion would con-

stitute a *gratuity*. But we are still confronted with the other objection that it would constitute a material change in the terms of the contract, which would release the surety, unless made with the surety's consent.

City of Chicago v. Agnew, 264 Ill. 288.

Finney v. Condon, 86 Ill. 78.

Calvert v. London Dock Co., 2 Keen 638.

It may be, however, that the Ketler-Elliott Erection Co. may be able to obtain the consent of their surety to the payment in question. If such consent is obtained we know of no serious legal objection to the city's making the payment requested.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Control of High Pressure Steam Generators.

Chicago, August 10, 1921.

HON. PHILIP M. GIESELER, President, Board of Examining Engineers.

Dear Sir:

We have your request for an opinion from this office regarding the *high pressure steam generator* which E. M. Wel-
ler & Co. are contemplating placing upon the market.

The Chicago Code of 1911, Section 2375, provides as follows:

“Sec. 2375. No steam engine or boiler subject to the provisions of this chapter shall be used, managed or operated in the city, except by an engineer or boiler or water tender as provided herein, and who shall have been duly licensed as provided herein, and who shall have and exhibit a certificate thereof. *Any person who shall take charge of or manage or operate any steam engine or boiler or any portion of a steam plant* in this city, without a proper and valid license, as provided by this chapter, shall for each offense be fined not less than \$20 nor more

than \$50, and any person or corporation owning or controlling any steam engine, boiler or other steam plant who shall authorize or permit any person without a proper and valid license, as required herein, to take charge of, manage or operate any steam engine or boiler or any portion of a steam plant, shall for each offense be fined not less than \$50 nor more than \$200, and each day's violation of any of the provisions of this chapter shall constitute a separate offense.

Sec. 2377. EXEMPT PERSONS. Engineers in charge of locomotives and engineers or boiler or water tenders in charge of boilers carrying not more *than ten pounds pressure of steam per square inch*, shall be exempt from the provisions of this chapter."

The ordinance of the city seems to cover this high pressure steam generator.

A boiler is to be construed as any apparatus used to generate steam.

The confessed purpose of this apparatus is to generate steam, and to generate steam in excess of the pressure indicated very clearly in Section 2377 of the Municipal Code.

Section 2375 of the Code includes "any portion of any steam plant"—surely this is very clearly a "steam plant" since the words "steam plant" mean only one thing, a plant or apparatus to be used in the generation of steam.

The mere use of a word, as a synonym or otherwise, does not disguise the real purpose of such an apparatus.

If we were to call a boat a street car, or some other equally distant term, such naming would not detract from the fact that such article was a boat.

A boat is a device to be used for water travel. What matters it if I call it what I may. It still remains a *boat*.

And so with this so-called "high pressure steam *generator*." The word *generator* does not disguise or change the nature of the apparatus. This device still remains a steam plant, within the meaning of the Municipal Code, Section 2375.

Very truly yours,

CARL J. APPELL,

Approved: Assistant Corporation Counsel.

JAMES W. BREEN,

Acting Corporation Counsel.

Maintenance of School Play Grounds.

Augst 13, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

Replying to your request for an opinion as to whether or not the City of Chicago can legally charge to the corporate funds the maintenance of the school playgrounds on property owned by the Board of Education and adjacent to school buildings, until such time as they are formally taken over and accepted by the Board of Education, we beg to state that in our opinion the city has no power to do so.

The act passed by the last General Assembly, a copy of which is herewith enclosed, provides that the Board of Education “*shall* take control and management of all public playgrounds” adjacent to or connected with any public school. It is not left to their discretion whether or not they will accept the trust. They *shall* do it, whether they desire it or not.

The statute does not expressly state when the playgrounds shall be taken over, but since it neither provides for any delay, nor prescribes any conditions which necessitate any delay, we are of the opinion that the statute must be construed to require the Board of Education to take over the playgrounds *immediately*, that is, as soon as the act should become law, which was July 1, 1921. This is the general rule of interpretation of statutes of this nature, where no other date is specified.

We understand that the 3/10 of one mill tax provided by the statute has already been voted by the City Council. Even that would not necessarily have been required to have been done *before* the playgrounds were turned over, for the statute specified that such tax shall be levied annually.

“upon the demand and under the direction of such Board of Education.”

In view of the above statute, we are of the opinion that the city has no longer any authority to control or manage such playgrounds, nor make any disbursements out of its cor-

porate funds (except the 3/10 mill tax aforesaid) for their maintenance.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,
Acting Corporation Counsel.

Expense Incident to Irregular Construction of Gas Main.

August 17, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

Your letter of August 8th to the corporation counsel, wherein you state that the city, in laying a 24-inch water main in Western avenue, selecting the east side of said street for such improvement, encountered difficulty in its progress because the Peoples Gas Light & Coke Company had not laid its 24-inch gas main straight, but had swung the same to the east side of said street between Balmoral and Hollywood avenues, and in which you inquire whether the expense of \$1,076.49 incident to said Gas Company's irregular construction of its main is chargeable to said company, was referred to the undersigned for an opinion.

The City Charter provides that the City Council shall have power to regulate the use of streets, and to regulate the openings therein for the laying of gas or water mains, pipes, sewers, tunnels and the like. The supervision incident to such laying of mains, and the like is vested in the commissioner of public works. Thus, the Gas Company having been permitted to lay its gas mains along certain designated streets and avenues, must keep within and conform to the side of street so authorized and designated. In the instant case, it is obvious the Peoples Gas Light & Coke Company deviated from the route covered by the permit, and by thus obstructing the progress of the city in constructing its water main in said avenue, entailed the expense men-

tioned. The amount of \$1,076.49, you say, is much less than it would cost the Gas Company if it were required to move the main in question.

From the facts and circumstances set out in your letter, we are of the opinion that this extra expense is rightfully chargeable to the Peoples Gas Light & Coke Company, and that said company is liable therefor.

Yours very truly,

ALFRED O. ERICKSON,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Annual License Fee for Part of Year in Which Ordinance
Was Passed.**

August 22, 1921.

MR. A. R. TEARNEY, President, The Western League.

Dear Sir:

Replying to your inquiry relative to what portion of the license fee prescribed by the ordinance of April 8, 1921, ought to be paid this year, the ordinance not having gone into effect before May 1st, permit us to say:

The ordinance makes no provision for any rebate the first year, notwithstanding that it did not go into effect until four months of the year had elapsed. We are therefore of the opinion that the full amount of the license fee should be paid this year.

The equitableness of this arrangement is a question of policy for the City Council rather than a question of law for the Law Department. However, the ordinance, as it stands, does not appear to us to be entirely inequitable, for it must be remembered that the ordinance of 1918 provided (in Section 6 thereof) for a license fee. This section was indeed, repealed in December, 1920, but at that time a new ordinance, providing for a new scale of fees, was already pending in the City Council, and any person engaging in any of the businesses in question, therefore, had ample notice that the city

was about to exact a license fee therefor. They can not therefore claim to have been in any way misled by the city in this regard.

So much for the equity of the case. We understand also that all other large concerns, similarly situated, have paid their license fees, and we can not advise you to do otherwise.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Permits for Filling in River Unlawful.

August 22, 1921.

HON. JAMES J. McCOMB, Harbor Master.

Dear Sir:

We return herewith the attached permits, without approval, as we can find no authority for the issuance of any permits for the filling in of any part of the Chicago river or any branches or slips connected with the same, without at least a formal vacation thereof by the City Council. Even the City Council cannot, however, order the filling in of a navigable stream without the permission of the State and Federal authorities.

Economy Light & Power Co. v. United States, 256
Fed. 792.

Economy Light & Power Co. v. United States, 256
U. S. 113.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Extension of Cemetery.

August 23, 1921.

Mr. HENRY M. SPANIER, 2042 Peterson Avenue.

Dear Sir:

Your letter to the mayor, inquiring about the authority of the Rose Hill Cemetery Company to open up a new cemetery across the street from their present location has been referred to this department for reply.

The Rosehill Cemetery Company was created by a special act of the Legislature in 1859, with power to acquire, hold and use lands, not exceeding 500 acres, in the Town of Lake View, for cemetery purposes. Ten years later, the Village of Lake View sought to limit the cemetery to the space then used for burial purposes, but the Supreme Court held that, *as to lands already acquired by the company*, the ordinance was unconstitutional.

Town of Lake View v. Rose Hill Cemetery Co., 70 Ill. 191..

The Supreme Court stated in that case, however, that the Town of Lake View had a perfect right to forbid the establishment of *new* cemeteries, if it saw fit.

In 1879 the Town of Lake View passed an ordinance defining the boundaries of the then existing cemeteries in the town and providing that no new cemeteries could be established without the formal permission of the municipal authorities. By the annexation of Lake View to Chicago this among other ordinances was continued in force, and is still the law.

In our opinion, a cemetery opened up across the street from the old one would be just as much a *new* cemetery as though it was established several blocks away. We are therefore of the opinion that no such cemetery can be established without permission from the city authorities and no such permission has been granted.

Yours very truly,

CARL J. APPELL,

Approved:

Assistant Corporation Counsel.

JAMES W. BREEN,

Acting Corporation Counsel.

**Licenses for Vehicles of Express Company Engaged in
Interstate Commerce.**

August 23, 1921.

HON. AGE ZYLSTRA, City Collector.

Dear Sir:

Replying to your request for an opinion as to whether the wagons and automobiles of the American Railway Express Company, are subject to the licenses prescribed by the ordinance for public carts, we beg to state:

A similar ordinance in the City of New York was declared by the Supreme Court of the United States to be unconstitutional, in so far as it affects the interstate business of an express company.

Barrett, Pres. of Adams Express Co. v. City of New York, 232 U. S. 14.

Whether it would be practicable to separate interstate from intrastate business in the imposition of a license fee is rather doubtful. At any rate the ordinance in its present form, does not do so. Neither did the New York ordinance above referred to; wherefore the Supreme Court held it to be entirely void, as applied to the Adams Express Company; and the same rule would no doubt apply to the American Railway Express Company.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Frontage Consent for Establishment of Stone-Cutter's Yards.

August 23, 1921.

HON. W. R. O'TOOLE, Chairman Committee on Buildings and Zoning.

Dear Sir:

Replying to your request for an opinion relative to the validity of the proposed ordinance providing for frontage con-

sent for the establishment of a stone-cutter's yard, we regret to say that, in our opinion it is very doubtful whether the City Council has any authority to pass such an ordinance. The Cities and Villages Act confers no express authority upon the City Council to regulate stone-cutter's yards. The nearest approach to it is paragraph 82 of Section 62 of the act, which gives the City Council power:

“To control the location and regulate the use and construction of breweries, distilleries, livery, boarding or sale stables, wagon repair shops, blacksmith shops, foundries, machine shops, public garages, private garages and stables designed for the use of five or more vehicles, hangars, laundries, bathing beaches, *brick yards*, planing mills, box factories, lead factories, steel factories, iron factories, ice plants, either for the manufacturing or storing of ice, factories or *other manufacturing establishments using machinery or emitting offensive or noxious fumes, odors or noises*, and storage warehouses, within the limits of the city or village; provided that this clause shall not be construed to require the removal of any of the above enumerated buildings from any location which they may lawfully occupy at the time of the passage of any ordinance hereunder.”

It will thus be noted that while, for instance, “brick yards” are mentioned in the above section, stone-cutters' yards are not, nor can stone-cutters' yards very well be said to be included in the general term “brick yards,” for they are essentially different in their nature and processes.

If the regulation of stone-cutters' yards, therefore, can be said to come within the statute, it will have to be by virtue of the general clause—

“other manufacturing establishments using machinery or emitting offensive or noxious fumes, odors or noises.”

Whether that description will apply to a stone-cutters' yard—except a large establishment “using machinery”—is questionable. Yet we do not regard it so clearly inapplicable that we would advise against the passage of the ordinance in its present form, if the City Council should desire to do so. Perhaps the best way of settling the question is to pass the

ordinance and let the objecting parties test its validity in the courts.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,
Acting Corporation Counsel.

**Liability of City for Damage Caused by Felling of Tree
by City Employes.**

Chicago, August 30, 1921.

HON. JOHN A. RICHERT, Chairman, Finance Committee.

Dear Sir:

Your letter of recent date, transmitting the claim of Nathan Sager, for damages to his plate glass window at 3106 Prairie avenue, and requesting an opinion as to the city's liability, has been referred to me.

It appears from the report that employes of the Small Parks Commission were felling a large tree directly across the street from the claimant and that when the tree fell a dead portion of the tree rebounded and struck the plate glass window, thus causing the damage complained of.

The way a piece of the tree flew off after the tree fell and struck the window could hardly have been anticipated by the exercise of reasonable care and prudence under the circumstances.

A municipal corporation is only required to use reasonable care and diligence to keep its streets in a reasonably safe condition and repair for travel, and when it has exercised such care it is not liable for injury occasioned by defects or obstructions.

City of Rock Island v. Gingles, 217 Ill. 185.

City of Lincoln v. Heinzel, 134 Ill. App. 439.

A dead tree along the streets is dangerous to the safety of the public, and it is the duty of the city to remove it. If, in the discharge of this duty, the city was guilty of no negli-

gence, and used reasonable care and diligence, it is not liable for any injury occasioned by its removal.

As it appears that the city was in the exercise of reasonable care and diligence in the discharge of a duty to the public in removing a dead tree from its streets, and was guilty of no negligence in so doing, it is not liable for injuries and accidents under such circumstances.

Yours very truly,

THADDEUS F. KUFLEWSKI,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Liability of City on Account of Flooding of Basement.

August 30, 1921.

HON. JOHN A. RICHERT, Chairman, Finance Committee,

Dear Sir:

On December 18, 1920, we rendered an opinion disclaiming liability in the matter of the claim of Horder's, Inc., located at Lake and Franklin streets, alleging damage in the sum of \$139.64 to the stock of goods stored in its basement, occasioned, it is said by the flooding of said basement on September 5, 1920.

It appears from a subsequent and more thorough investigation that the readjustment of the sewer system in the east gutter of Franklin street, adjacent to Horder's, was done by the city's own men (Construction Division, Bureau of Engineering, Department of Public Works) and not by a private contractor, as we inferred from the former report.

We quote from City Engineer P. S. Combs' communication, embodying the report of the Bridge Division, as follows:

“A very heavy rain occurred late Sunday night, September 5, 1920, and as a result a considerable amount of water gathered in a hole which had been excavated during the rebuilding of the new catch basin. It should be here mentioned that during the removal of the old sidewalk at this location, the rain gutter of the canopy

overhead was destroyed, and this condition may have caused a greater amount of water to collect in this hole than would otherwise have occurred. Water seeped into the basement through an old portion of the curb retaining wall which had not been nor was to be reconstructed.

This wall is of rubble masonry construction and not impervious to water seepage. Water also seeped into the basement from the alley through the rear wall of this building. The water which seeped into the basement reached an average depth of 6 inches and it was fully 8 hours before it flushed away through the catch basins which are located in the basement of the building, being two in number.

No sump pits or pumps to take care of such an emergency are in this building.

A considerable amount of merchandise was damaged by the water, a list of which follows:
(Here follows list.)

There were probably three elements which caused, or contributed to cause, the overflow, each of which was the result of work done by the city:

(1) A large, deep hole was excavated in connection with readjustment of the sewer system, in the east gutter of Franklin street, adjacent to Horder's; this collected and held the water, from which it seeped into the cellar.

(2) In excavating the above hole, the excavated dirt was piled up in the gutter, extending onto the sidewalk and well toward the middle of the street, completely blocking the natural drainage (south along Franklin to Lake) and backing the water up over the sidewalk, causing it to flood the cellar.

(3) The amount of water was augmented considerably by the fact that on the preceding day (or very shortly prior to the flooding) the rain gutter of an overhead canopy was accidentally torn off by one of the city's cranes. This rain gutter had been connected with the roof drainage of the rest of the building, and was conveyed to the sewer by means of a downspout. With the gutter off, the canopy-shed drained onto the sidewalk and into the street, thereby increasing the amount of water held by the obstruction.

The following Illinois cases are noted, bearing on the city's liability:

In *City of Aurora v. Gillett*, 56 Ill. 132, it appeared that by reason of the street gutters being allowed to be clogged

and choked, water overran and flowed into plaintiff's basement, damaging sugar, coffee, tea and other stock stored therein. The plaintiff was allowed to recover damages.

Similarly, in *City of Elgin v. Kimball et al.*, 90 Ill. 356, the mouth of a sewer was clogged, causing overflow into the plaintiff's basement, damaging merchandise. The plaintiff recovered.

City of Peoria v. Eisler, 62 Ill. App. 26, is practically the same, in facts and holding. Plaintiff's goods, stored in his basement, were damaged by overflow caused by clogged gutter, and he was given judgment.

City of Alton v. Hope, 68 Ill. 167, and *Leymand v. Village of Cherry*, 203 Ill. App. 541, are cases also holding the city liable for damages from overflow, although the facts were not, in detail, the same as in the present case.

On the question of the duty of the property owner to install devices to prevent damage from flooding, we refer to *C. & N. W. Ry. v. Stroud*, 129 Ill. App. 348 (355), decided in 1906, which holds that no such duty is imposed on the owner. The opinion reads in part:

"The law does impose upon a person injured by the negligence of another the duty to make reasonable efforts to render that injury as small as possible, and it does not permit him to recover damages for any increase of loss consequent upon a failure to perform that duty. (Citing cases.) But we do not think the above mentioned rule applicable to the facts of this case. It does not appear that when the heavy rain came, as a consequence of which appellee's land was flooded, there was anything that appellee could *then* have done to have prevented the destruction of his property. *We do not regard the rule as requiring that some time previous he should, in anticipation of a flood, have protected his premises from the risk to which they were exposed by the conduct of appellant.*"

From the foregoing Illinois decisions bearing upon like cases, and also from decisions in jurisdictions other than Illinois, we are of the opinion that there is liability on the part

of the city, and you are at liberty to make such adjustment as you deem expedient in the premises.

Very truly yours,

ALFRED O. ERICKSON,
Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,
Acting Corporation Counsel.

**Payment of Voucher for Materials Purchased During
Preceding Year.**

September 6, 1921.

HON. GEORGE F. HARDING, Comptroller.

Dear Sir:

Replying to your letter of the 26th ulto., requesting an opinion relative to your authority to pay voucher to Lake Superior Piling Company for lumber purchased under contract of June 4, 1920, but not delivered until 1921, permit us to say:

First: There appears to be some difference of opinion between your department and the Department of Public Works as to whether the contract is a "time contract" or a "quantity contract." In our opinion it is a *quantity contract*. It provides for the unconditional delivery of approximately 500 oak piles. The word "approximately" does not, in our opinion, make the amount uncertain, but is merely one of those words of convenience (like "more or less," for instance) which are often used in contracts to obviate disputes over trifling details.

The contract does provide that the delivery shall be completed within sixty days after notification by the city, unless performance is "either expressly or by implication extended." Acceptance of piles after the expiration of such time would certainly amount to an implied extension of time. Besides, it is an elementary rule of law that *time* is not of the essence

of a contract unless expressly and unequivocally made so by the terms of the contract itself. The sole effect of the 60-day clause in this contract was, in our opinion, to give the city the right to refuse to accept any more piles. But if it did not elect to avail itself of this privilege the contract continued in full force.

Second: The contract reads, however:

“This agreement is entered into on account of the water fund, and in accordance with an appropriation passed by the City Council on the 31st day of March, 1920.”

But the courts have held that where, at the time of ordering certain supplies for municipal purposes, there is more than enough proper appropriation unexpended to pay for them, the city will be liable, notwithstanding such appropriation is subsequently exhausted.

City of Chicago v. Berger, 100 Ill. App. 158.

City of Chicago v. Nicholson, 130 Ill. App. 466.

In the *Berger case*, *supra*, (which related to certain photographs ordered by the corporation counsel for use in the trial of certain pending cases) the court said:

“The city has had the benefit of plaintiff’s services; has accepted and retained the photographs; and should in common honesty pay for them; *Blake v. Sanitary District*, 77 Ill. App. 287; *Harvey v. Wilson*, 78 *ib.* 544.”

For the reasons above stated, we are of the opinion that if at the time the piles in question were ordered there was a sufficient unexpended appropriation for such purposes to pay for them, the company is entitled to recover for all piles delivered by them and accepted by the city.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel,

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Town Hall at Clearing.

September 6, 1921.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

Replying to your request for an opinion from the corporation counsel, relative to the ownership of the Town Hall at Clearing, and the city's right in reference thereto, we beg to state:

The County records show that the title to the property is in the *Town of Stickney*, that governmental entity having acquired the same in 1912, *after* the organization of the Village of Clearing. The Village of Clearing, it appears, never owned the Town Hall, and when the village afterwards was annexed to the City of Chicago, the city could acquire no greater rights to the Town Hall than the Village of Clearing had—which was none at all, so far as the record shows.

The rights of the city in the Town Hall are therefore dependent entirely upon the terms of its lease from the Town of Stickney, and in our opinion are to be governed by the same principles as if the city had leased the property from a private party.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

*Acting Corporation Counsel.***Proceeds of Fines Paid Into Public Library Pension Fund.**

September 12, 1921.

MR. HARRY G. WILSON, Secretary, The Chicago Public Library, Chicago, Illinois.

Dear Sir:

Your communication of the 2nd instant has been received, and I have carefully noted the contents.

In reply, I desire to advise you that Section 1 of an act entitled, "An act to provide for the formation and disburse-

ment of a public library employees pension fund," approved May 12, 1905, in force July 1, 1905, provided that the said fund should consist of amounts retained from the salary or wages of employees and such other moneys derived from miscellaneous sources as the Board of Directors shall determine. Under this provision of the statute the Library Board has authority in its discretion to provide that the money collected as fines for the retention of books beyond the time prescribed by the rules governing the loaning of books should be paid over to the Public Library Employees Pension Fund. This discretionary power on the part of the Library Board continued until July 1, 1921, when Section 1 of the Public Library Employees Pension Fund Act was amended to provide that the pension fund shall consist of amounts retained from salary or wages of employees, all fees and penalties collected for retention of books beyond the time prescribed by rule of the Board of Directors, by virtue of by-laws, rules and regulations adopted under authority of Section 5, and such other moneys derived from miscellaneous sources as the Board of Directors shall determine.

Since July 1, 1921, it is mandatory on the part of the Board of Directors of the Chicago Public Library to appropriate and turn over to the Public Library Employees Pension Fund all moneys collected as fines for the retention of books. Prior to July 1, 1921, it was discretionary on the part of the Board of Directors to provide for the turning over to the Public Library Employees Pension Fund the money collected as fines for the retention of books.

There can be no question raised as to your right or authority to pay over to the treasurer of the pension fund the moneys provided for in the annual budget of the Board of Directors of the Chicago Public Library.

The amendment to the Pension Act, in force and effect July 1, 1921, making it mandatory on the part of the Library Board to pay over to the pension fund the moneys collected as fines for retention of books in no way affects the action of the Library Board in having ordered that such moneys be turned over prior to July 1, 1921. As I have explained in

this letter, while it was not mandatory on the part of the board to turn the fine money over to the Pension Board prior to July 1, 1921, the Library Board did have the power and authority to turn over any moneys derived from miscellaneous sources that the Board of Directors might determine. The fines received by the Library Board for the retention of books was one of the miscellaneous sources of revenue that the Library Board, prior to July 1, 1921, had power and authority, under its discretion, to order turned over to the Public Library Employees Pension Fund, and the Board of Directors having seen fit to exercise its discretion and order the same turned over, this prevents any one from attempting to hold you, as the secretary, personally liable. You simply complied with the orders and directions of the Board of Directors.

On account of the change in the law that I have referred to in this communication, it is now mandatory that the fines collected for the retention of books shall be turned over to the pension fund, and your personal liability can not be involved in any way in so far as turning over the money in question to the pension fund is concerned.

Yours truly,

JAMES W. BREEN,
Acting Corporation Counsel

Distribution of Cash Prizes at Theaters.

September 13, 1921.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

Replying to your request for an opinion from the corporation counsel as to whether the plan of the LaSalle Theater in distributing cash prizes to such of its patrons as draw lucky coupons, amounts to a lottery or gambling scheme, we beg to state that, in our opinion, it clearly does.

The scheme is essentially identical with that condemned by the Supreme Court of Illinois in the case of *Thomas v. The People*, 59 Ill. 160, where tickets at \$5.00 a piece were

sold for a series of entertainments in aid of the erection of an "Industrial College and Home for Unfortunate Females," which tickets carried with them the right to an artistic steel plate engraving and, in addition thereto, the chance of winning prizes ranging from \$2 to \$50,000. The Supreme Court said:

"Here then was a scheme for the distribution of prizes. Was the distribution *certain and fixed*, or was it to be by chance? * * *

"From the facts developed, we assume that it is not only probable, beyond a reasonable doubt, but almost an absolute certainty, that some of the numerous purchasers would have received blanks. We think this was intended. *Even if the ticket to the concerts and lectures and an engraving, were intrinsically worth \$5, the scheme would still be a lottery.* The handbill advertisement delivered with each ticket held out inducements to purchase. Each person who invested \$5 became entitled to a chance for \$50,000 in glittering gold, or \$25,000 in greenbacks, or a splendid residence in Chicago, or in Brooklyn, N. Y. The purchasers were thus incited to rivalry. Gold, which, in the estimation of some, opens all the avenues of pleasure, was the lure to incite the credulous and unsuspecting into this scheme.

"Had not this plan been watched by the vigilance of the law, can there be any doubt that numerous persons would have purchased tickets, prompted by the hope of gain? Are there not inseparably connected with it the same fascination and excitement and intense desire for gain which gather around the gambling table?

"Like any other species of gambling, lotteries have a pernicious influence upon the character of all engaged in them. This influence may not be so direct, and the immediate consequences so disastrous, as in some kinds of gambling which rouse the violent passions and stake the gambler's whole fortune upon the throw of a die. *The temptations, however, are thrown in the way of a larger number and a better class.* The evil may spread more widely and infect more deeply. * * *

"Counsel argued that the object to be obtained is high and holy. To redeem an unfortunate class from ruin, degradation and fate worse than death, is a noble and Christian work. The laborers in such a cause deserve universal sympathy.

“The law does not manifest sympathy, but dispenses evenhanded justice. Enthroned in its majesty, it smiles and frowns upon all alike. Submission to its authority is incumbent upon all.”

In the case of *Dunn v. The People*, 40 Ill. 465, the defendant had advertised and worked a scheme of selling at \$1 a piece, sealed envelopes containing tickets, some of them entitling the holder to mere worthless trinkets, others entitling the holder to pianos, watches, sewing machines, jewelry, etc., of great value. The Supreme Court, in declaring the scheme to be unlawful, said:

“Neither would the character of the transaction be changed by assuming that the ticket in every envelope really represents some article of merchandise intrinsically worth the dollar which the holder will be obliged to pay. If every ticket in an ordinary lottery represented a prize of some value, yet, if these prizes were of *unequal value*, the scheme of distribution would still remain a lottery.”

In the case of *Horner v. United States*, 147 U. S. 449, the Supreme Court of the United States held that certain bonds issued by the Austrian Government constituted a lottery scheme, and hence were not transmittable through the U. S. mail, because they contained a provision that the holder of certain of such bonds—to be determined by an annual drawing—should receive cash prizes in addition to what other and less lucky bondholders would receive. The court added:

“Our statute does not justify a court * * * in deciding a thing not a lottery, simply because there can be no *loss*, when there may be very large *contingent gains*, or because it lacks some element of a lottery according to some particular dictionary’s definition of one, when it has all the other elements, with all the pernicious tendencies, which the state is seeking to prevent.”

Other cases to the same effect are:

Elder v. Chapman, 176 Ill. 150.

Loveland v. Bode, 214 Ill. App. 399.

State v. Dalton, 22 R. I. 83.

Lynch v. Rosenthal, 144 Ind. 86.

Taylor v. Smetten, L. R. 11 Q. B. Div. 207.

Reg. v. Harris, 10 Cox, C. C. 352.

Davenport v. Ottawa, 54 Kan. 711.

State v. Lumsden, 89 N. C. 573.

Burks v. Harris, 23 L. R. A. (N. S.) 626.

Any plan of the nature above mentioned will constitute a lottery, unless it provides prizes for *all* customers, of substantially *equal value*.

For the reasons above stated, we are of the opinion that the scheme in question is a lottery, and as such constitutes a violation of the statute.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Analysis and Interpretation of Zoning Law.

September 15, 1921.

HON. CHARLES BOSTROM, Chairman, Zoning Commission.

Dear Sir:

In response to your request for an opinion defining the duties and powers of the Zoning Commission under the Zoning Act of 1921, we submit the following:

The so-called Zoning Act of 1921 replaces a somewhat similar act passed in 1919, under which the Zoning Commission was appointed, but contains a saving clause which provides that steps taken under the act of 1919 shall be valid if they conform to the requirements of the new act.

The principal reason why the Act of 1919 was repealed was because it was framed on the theory that zoning would be accomplished through the passage of a number of ordinances controlling and regulating limited districts within the city. A very rigid and unelastic system of giving notice was devised for this purpose. This was done to satisfy the representatives of the manufacturing interests and was well designed to safeguard and protect them, but the system was

wholly impracticable for purposes of comprehensive zoning. Another impractical feature of the law of 1919 which was done away with was the control the owners of property retained under that act over the character of the district. This was not possible under a comprehensive zoning plan.

Aside from noting the changes just mentioned, there is no occasion for further considering the law of 1919, because in the main it does not conflict with the later act.

The zoning law under which the commission will proceed is based almost entirely on the police powers. There is a reference, in the very first sentence, to the conservation of the taxable value of land and buildings, and it is quite likely that our Supreme Court, if called upon to pass on the validity of ordinances passed in pursuance of the act, will take into consideration the question of conservation of revenue. But proof of benefit to the public revenue will at best be difficult and its realization remote. Hence, we believe that it would be safer to assume that ordinances which stand firmly on some well-recognized principle founded on the police powers will be more certain to receive the sanction of our courts.

While the term "police power" is not susceptible of exact definition, its general meaning is well enough understood so that we do not consider it necessary to dwell on the nature and extent of this power. It is sufficient for the purpose of this opinion to say that the "police power" is that authority which organized society is compelled to keep within its control and to exercise to the extent that may be necessary in order to protect itself. It is a power that is exercised to promote and conserve the health, safety, morals, comfort and welfare of the public.

In the matter of zoning, the General Assembly has delegated practically the whole of the police powers of the state to the City Council. It has authorized the exercise of the powers mentioned specifically for the purpose of securing adequate light, pure air, safety from fire and other dangers and for the purpose of avoiding and lessening congestion in the public streets, and generally for the purpose of promoting

the public health, safety, comfort, morals and welfare. Such specific and general enumeration covers the whole range of police powers.

This complete power may be exercised by the City Council for the following purposes:

“To regulate and limit the height and bulk of buildings hereafter to be erected; to regulate and limit the intensity of the use of lot areas, and to regulate and determine the area of open spaces within and surrounding such buildings; to classify, regulate and restrict the location of trades and industries and the location of buildings designed for specified industrial, business, residential and other uses; to divide the entire city, village or incorporated town into districts of such number, shape, area and of such different classes (according to use of land and buildings, height and bulk of buildings, intensity of the use of lot areas, area of open spaces, or other classification) as may be deemed best suited to carry out the purposes of this act; to fix standards to which buildings or structures shall conform therein; to prohibit uses, buildings or structures incompatible with the character of such districts respectively; and to prevent additions to and alteration or remodeling of existing buildings or structures in such a way as to avoid the restrictions and limitations lawfully imposed hereunder.”

It will be seen at once that, with such powers as are thus given to the City Council, almost any comprehensive scheme of zoning that could be devised would be included. But this is not an unbridled and uncontrolled power. It is limited in the first instance by existing constitutional limitations and by the limitations on the police power, and next, it is limited by express provisions in the act.

The extent to which the City Council is limited by law independent of the statute before us, is a subject on which much uncertainty exists. Our Supreme Court has drawn the line very tightly in some respects and has given us much latitude in others. In a general way, it may be said that the court does not look with favor on the inclusion of a business, or building, or other thing, within the purview of the police power unless there is actually ground for regulation and control, while on the other hand, it sanctions what some

courts regard as an extreme exercise of the police power in case the subject matter comes within its range. The cases we cite illustrate more fully what we seek to convey.

In the case of *People ex rel. Friend v. City of Chicago*, 261 Ill. 16, the court had under consideration an ordinance which prohibited a person from building a store, without first obtaining frontage consents from the property owners, in a block in which all the buildings are used exclusively for residence purposes.

The court held that not only had there been no authority delegated to the City Council to do this, but that if there had been such authority given it would have been of no avail—that such a building, used for ordinary purposes of a retail store, was not subject to the police power in this respect. Among other things the court said:

“The owner of property has the constitutional right to make any use of it he desires, so long as he does not endanger or threaten the safety, health and comfort or general welfare of the public. This right cannot be wholly taken away or limited by the state except in so far as it may become necessary for individual rights to yield to the higher and greater law of the best interest of the public. (*Haller Sign Works v. Training School*, 249 Ill. 436.) There is nothing inherently dangerous to the health or safety of the public in conducting a retail store. It may be that in certain exclusively residential districts the owners of residence property would prefer not to have any retail stores in such blocks, but if such be the case it manifestly arises solely from aesthetic considerations, disconnected entirely from any relation to the public health, morals, comfort or general welfare. Legislation, either by the state or by municipal corporations, which interferes with private property rights or personal liberty, can not be sustained for purely aesthetic purposes.”

People ex rel. Friend v. City of Chicago, 261 Ill. 16.

If the case just quoted from (and others that might be cited which are almost equally strong on the doctrine of the constitutional rights of the owner of real estate) stood alone, so that the principle announced in the quotation could not be distinguished when applied to a comprehensive zoning plan, it might well be said that the attitude of our Supreme Court

foreshadows an obstacle to an effective zoning law. The City of Minneapolis encountered this obstacle after the Minnesota Legislature had given it the necessary authority to enact legislation of this kind. (See *State ex rel. Lachtman v. Houghton*, 134 Minn. 226.) New York and other cities were more fortunate in not having the constitutional question involved in the above quotation so squarely presented.

Fortunately for our present needs, however, we are able to point to Illinois Supreme Court decisions which strongly support the other position indicated above, *viz.*, that where any ground for the interposition of the police power exists the court will sustain its exercise even though it may be contended that the danger to be remedied is remote and the means used to overcome it are extreme.

To begin with, the court has consistently held that the class of ordinances known as frontage consent ordinances, where they concern an occupation or business to which the police powers may be applicable, will stand.

City of Chicago v. Stratton, 162 Ill. 494.

People ex rel. Keller v. Village of Oak Park, 266 Ill. 365.

These ordinances have been sustained on the theory that where the municipality has the right to prohibit, limit or control the location of a business, such right may be waived by the property owners especially interested. This principle is one that will have an important bearing on the work before the commission, inasmuch as the waiver of such rights by the property owners of the whole municipality in a comprehensive zoning scheme forms the basis of that feature of zoning ordinances which makes them elastic and workable.

In addition to the support that our courts have given to the frontage consent ordinances, we have some very strong decisions concerning the right of the municipality to exclude certain businesses altogether from localities where their influence would be baneful.

Thus, in the case of *People ex rel. Busching v. Ericsson*, 263 Ill. 368, the Supreme Court held that an ordinance for the prohibition of a garage within 200 feet of a church, hos-

pital, or public or parochial school was applicable even though the particular street on which it was to be erected was not residential in character. In *Nahser v. City of Chicago*, 271 Ill. 288, the court held that a theater could be prohibited where it was located within the proscribed distance from a church, even though the entrance was on another street and far removed from the church entrance.

Again, in the case of *Cusack v. City of Chicago*, 267 Ill. 344, a case which went to the Supreme Court of the United States and was there affirmed (*Cusack v. City of Chicago*, 242 U. S. 526), the court held that the police powers of the municipality could be exercised to prevent the erection of billboards in residential districts, even though the case was fiercely contested on the point that the city's contentions as to the menace to health and morals were frivolous and far-fetched.

From the above it will be seen that while we are far from certain of our ground as to the limitations that the constitution and existing laws put upon the authority conferred under the Zoning Act, nevertheless, we can safely assume that any city-wide zoning ordinance which otherwise conforms to the act and makes classifications that can be justified as an exercise of the police power will be sustained by the courts.

In addition to the limitations that already exist, the Zoning Act itself limits the authority of the City Council specifically in a number of ways, all plainly set forth in apt language. It requires that due allowance must be made for existing conditions, the conservation of property values, the direction of building development and the uses to which property is devoted at the time of the enactment of any zoning ordinance. The powers of the City Council can not be exercised so as to deprive the owner of any existing building of its use or maintenance for the purpose to which it is then lawfully devoted. And, finally, there are certain rights given to owners of property which cannot be over-ridden except by the favorable votes of two-thirds of the members of the City Council. In this way the Legislature has sought to bring the exercise of the powers conferred by the Zoning Law within certain bounds, so that even though ill-considered plans may

be proposed, they will be either thrust aside or modified before they are enacted.

In all of the foregoing we have spoken of the powers of the City Council and its duties without making particular reference to the part which the Zoning Commission takes in the enactment of a zoning ordinance. The duties of the commission are, in their nature, advisory, and when we indicate the powers and duties of the City Council it will be understood, of course, that the Zoning Commission, in making its recommendations to the City Council, will be guided as the City Council would have to be guided if it acted on its own initiative.

The creation of the Zoning Commission was intended as a means of preventing ill-advised or hasty action on the part of the City Council. The commission is presumed to undertake the great work of making the necessary investigation, preparing the plans and formulating an ordinance which will form the basis for all future legislation on the subject.

We have in view, in writing this opinion, the fact that as the commission proceeds with its work it will meet with difficulties, and many questions will arise concerning details that can not be discussed in advance. Our purpose is mainly to advise you as to the general powers which the City Council has under the act, and which are to be exercised by the Zoning Commission in lieu of the City Council.

Respectfully yours,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Effect of Order of City Council to Withhold Building Permit.

September 28, 1921.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

Replying to your request for an opinion as to your authority to issue a building permit to the Niagara Radiator

& Boiler Company for the erection of a boiler and radiator factory on 83rd street near Woodlawn avenue, we beg leave to advise you that, in our opinion, the applicant has complied with all the terms and provisions of the ordinances of the City of Chicago now in force and effect regulating the construction of buildings of the character referred to in your communication and the issuance of permits for the same.

While it is true that the City Council has passed an order directing you to withhold the issuance of a permit for the erection of the building in question, we feel compelled to advise you, as a matter of law, that in determining this question you must be guided solely by the ordinances of the city. Our Supreme Court has repeatedly held that an ordinance of the city can not be amended or repealed by an order, and that where the terms and provisions of an ordinance and an order are in conflict the order must give way to the ordinance.

We therefore recommend that, in accordance with the terms and provisions of the ordinance, you issue a permit to the applicant in this case.

Yours very truly,

JAMES W. BREEN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Liability of City for Damages Caused by Explosion in Sewer Manhole.

September 28, 1921.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Replying to your letter of recent date in which you transmit council order, affidavit and bill, in the claim of C. D. Lusk, and request an opinion as to the city's liability in the premises, we beg to advise you as follows:

From the facts in the case it appears that the damages to the property of the claimant were caused by an explosion in a sewer manhole on East 47th street near claimant's property.

A municipality is bound to exercise due care and skill in constructing and maintaining sewer mains, but it is not an insurer of the safe condition of property. Consequently, in the absence of negligence on the part of the city, the city could not be held liable.

In *Terry v. The Mayor, etc., of New York*, 8th Bosworth, 510, the court said:

“No one is responsible for injury committed by their breaking unless caused by negligence or design. If all due diligence is used in making or maintaining the pipes, the injury becomes an unavoidable accident for which no one is responsible. There is no evidence that the pipes were originally defective, and as they were in long before the damage in this particular matter, they must have been originally strong.”

And the court in the same case further said:

“If the pipes were originally sound there was no proof of want of care in repairing any known defects or discovering them. Neglect is not to be presumed any more than fraud, except in cases where the policy of the law places the burden of disproving it upon the party.”

In the case of *Selz, Schwab & Co. v. The City of Chicago*, 202 Ill. 549, the court said:

“There were no facts stated from which the law would imply a duty of inspecting the pipes laid deep in the earth below the streets, or any facts showing for what reason an inspection would or could be necessary. Judging from the facts stated in the court, an inspection of mains and pipes under the streets would be impossible, and if there were any facts showing the necessity or propriety of such an inspection they should have been alleged.”

Therefore, in view of the above cases, we are of the opinion that the city is not liable.

Yours truly,

THADDEUS F. KUFLEWSKI,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel,

Payment for Moving Electric Poles.

October 3, 1921.

HON. WILLIAM G. KEITH, Commissioner of Gas and Electricity.
Dear Sir :

We have your request for an opinion from the corporation counsel relative to the following proposition :

“Will it be possible from a legal point of view to include the cost of moving electric light poles, wires and cables, made necessary by an improvement installed under special assessment, in the estimates for the improvement and pay for the same from the funds thus provided?”

We assume that the above refers only to poles, wires, etc., owned by the city and not to any owned by private corporations.

We understand it has not been customary hitherto to include such items in the estimated cost of the local improvement, but to pay the same out of the general appropriations for the Department of Gas and Electricity. Such custom, however, is not, in our opinion, founded either on law or on sound reason. Where, for instance, a local improvement, paid for by special assessment, provides for the paving and the widening of a street in such a manner as to leave an electric light pole standing in the road bed of the street, the removal of such pole to a safe location is certainly a necessary part of the improvement of the street (without which the rest of the improvement would be incomplete) and it ought, therefore, to be included in the estimate of the cost and paid for out of the special assessments therefor. There is, in our opinion, no more reason why the general public should be taxed for this item than for the rest of the improvement.

That the poles, wires, lamps, etc., of an electric light system, are improvements of such permanent nature as to be proper subjects of special assessments, has been expressly held by the courts. In the case of *Ewart v. Village of Western Springs*, 180 Ill. 318, our Supreme Court held that while a power house or electric generator could not be classed as a local improvement, the poles, wires and lamps placed on a

particular street came within that classification. The court said:

“Property is in fact specially benefited by electric or other adequate lighting along the street, on which it is situated quite as much as it is benefited by water mains. It follows that, if water mains are local improvements, poles and wires in an electric light system are also local improvements. The former are conduits for water, the latter for electricity. * * *

“The improvement, which consists of the erection of poles, wires and lamps in an electric light system, is certainly as much a permanent improvement, as the water mains and hydrants in a system of waterworks.”

The same doctrine was reiterated in the recent case of *City of Springfield v. Springfield Ry. Co.*, 296 Ill. 17.

It is also well settled that the fact that an improvement may consist of several items or elements, is no objection to its validity. Thus, in *Murphy v. City of Peoria*, 119 Ill. 509, our Supreme Court said:

“As to the third objection, that three distinct improvements are united in one, we do not regard the point as well taken. It is true that the ordinance provided for graveling the road, sodding the center of the street, and a sewer under the street, but we do not regard these as separate and distinct improvements, as was that in *Weckler v. City of Chicago*, 61 Ill. 142, but the three things required to be done are but constituent parts of one improvement. The three elements required, when all united, made *the improved street* contemplated by the ordinance.”

In the class of cases here under consideration, there cannot well be any doubt that the removal of the electric poles, wires, etc., from the road bed of the street is a very essential element in the improvement of the street, quite as much so as the raising of manholes or the changing of curblines, the cost of which is commonly included in special assessments. There is no reason, therefore, in our opinion, why it should not be included in the estimates of costs, and paid by special assessments.

We would suggest, therefore, that in all future local improvements where it is necessary to move electric light wires

or poles, etc., the cost of the same be included in the estimates by the Board of Local Improvements and in the ordinances thereupon passed by the City Council. If the Board of Local Improvements should feel any hesitancy about changing a custom that seems to have been followed for many years—though without any proper legal basis—and would prefer that the City Council assume responsibility for the same, an order by the City Council directing them to henceforth include such items in their estimates, would in our opinion be the proper course. In any event the items would, of course, have to be included in the ordinance authorizing the improvement, in order to be payable out of special assessments therefor.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Issuance of Permits for Construction Work at Harbor Where Riparian Rights Have Been Relinquished.

October 6, 1921.

HON. JAMES J. McCOMB, Harbor Master.

Dear Sir:

Answering your inquiry of the 19th instant re the issuing of harbor permits for construction work where riparian rights have been relinquished, it is my opinion that it is necessary for riparian owners to acquire harbor permits. As a general proposition the Legislature is omnipotent in all matters relating to the authorization of the formation of municipal corporations and investing them with powers of local government, except so far as restrictions have been placed upon the Legislature by the constitution. (*Wilson v. Sanitary District of Chicago*, 133 Ill. 443.)

From this proposition arise two corollaries. The first one is that when a statute is clearly repugnant in terms to an ordinance, the statute, being the superior authority, prevails. (*Robinson v. Village of Park Ridge*, 100 Ill. App. 409.)

On the other hand, as a second corollary, if the ordinance and statute do not conflict, they may operate concurrently; thus Abbott on Municipal Corporations, page 1343, says:

“if there is an express grant of the power to public corporations, including municipal, to deal with certain questions, especially those concerning the police power, it is immaterial that state statutes may also regulate the same matters. Municipal ordinances in such cases will be sustained though there may exist state laws upon the same subject.” (*City of Chicago v. Brownell*, 41 Ill. App. 70; *City of Spring Valley v. Spring Valley Coal Co.*, 71 Ill. App. 432.)

So the matter resolves itself into a question of whether the statute and ordinance are conflicting.

Section 234 of the state statutes re Parks, which provides for the acquiring of riparian rights, provides that

“such submerged and penetrating lands shall be taken, owned and used by said riparian or other owners in lieu of and as a compensation for the release of said lands and riparian rights.”

Section 1127 of the municipal code provides that there shall be no encroachment on the harbor lines without permission in writing from the commissioner of public works, and such permit shall not be issued if “it shall appear that the work desired to be done will result in unduly obstructing the harbor, or endangering the safety of any dock, etc.”

It is a familiar canon of construction that “in ascertaining the legislative intention in the adoption of a new statute, one of the most efficient means is to consider it with reference to previous legislation on the same subject.” (*Wright v. People*, 101 Ill. 126.) Therefore it is to be presumed that the Legislature was cognizant of this ordinance (a similar ordinance having existed prior to the statute), and since there is no direct expression to the contrary and since the ordinance and statute are not directly repugnant it may be presumed that the Legislature intended them to operate concurrently.

The case of the *City of Spring Valley v. Spring Valley Coal Company*, 71 Ill. App. 432, is directly in point. There it was held that the act of 1895, whereby the mine inspectors of the state were made ex-officio inspectors of weights and meas-

ures of coal in their respective districts, does not operate to repeal, either in whole or in part, a city ordinance providing for the appointment of a city inspector of weights and measures, and prescribing his duties. And it was held that an ordinance providing for the appointment of an inspector of weights and measures, prescribing his duties and establishing rules as to the use of weights and measures, is considered by the court, and held to be reasonable and a proper exercise of the power of the city. So here, the ordinance is a reasonable and valid exercise of the police power, for it is necessary to see that no riparian owner builds beyond his line and thereby encroaches on the city's property. So the ordinance and statute may operate together.

It is also certain that the new shore line and the water between it and the proposed boulevard will constitute part of the harbor as defined in the Municipal Code. The harbor is defined to be:

“* * * and the waters of Lake Michigan, including all breakwaters, piers and permanent structures therein for a distance of three miles from the shore between the north and south lines of the city extended” (Sec. 1097 Chicago Code of 1911.)

Since the intervening lagoon will not be wholly enclosed but will be connected with the lake at various points, it constitutes part of the harbor as above defined and hence is properly a subject of regulation under Section 1127 of The Chicago Code of 1911.

Yours very truly,
ALBERT HENRY VEEDER,

Approved: *Assistant Corporation Counsel.*
SAMUEL A. ETTELSON,
Corporation Counsel.

Liability of City for Street Car Breaking Through Viaduct.

October 13, 1921.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

Your letter of October 5, 1921, to corporation counsel, attaching documents bearing upon the claim of Chicago Rail-

ways Company, in the amounts of \$2,819.93 and \$58.06 for reimbursement incident to repairing damage to a street car as a result of breaking through the West 18th street viaduct in August, 1919, was referred to the undersigned.

The damages claimed are not legally chargeable against the city. Viaducts were built for convenience sake, and to protect life and property coupled with improvement of service on the part of railways entering Chicago.

The viaduct over West 18th street was built for and on behalf of the Pennsylvania Railroad Company, commonly known as the "Pennsylvania Lines." The duty of maintaining the structure was therefore upon the Pennsylvania Lines. This fact is borne out by the application of the Pennsylvania Lines dated September, 1911, wherein it applies to the city for permission to reconstruct the temporary structure incident to the erection of the new Union Station.

We quote herewith the agreement on the part of the city:

"September 29th, 1911.

"Pennsylvania Lines,
Union Depot,
Chicago.

"Gentlemen:

"You are hereby granted permission to reconstruct the 18th street viaduct over your tracks, in accordance with plans on file in this office.

"This permit is given with the understanding that the Pennsylvania Lines must comply with all ordinances of the City of Chicago now in force, and that your company must assume all responsibility for any damage to life and property during the progress of the work.

"Yours truly,

.....
"Commissioner of Public Works."

Because of the depletion of the city's finances, according to the data attached, the city requested the Pennsylvania Railroad Company at the time of the damage to the viaduct, to supply the necessary funds with which to repair the same, and the city's request was complied with.

It may be urged that the viaduct in question was old and dilapidated; that it was a temporary structure awaiting the erection of the new Union Station.

It is a well known fact that because of the intervention of the World War all building operations were suspended, and the building of the new Union Station came within this provision.

In conclusion we must hold that the obligation to protect the public, under the circumstances herein stated, was imposed upon the Pennsylvania Lines. It is so not only by the common law, but by statute as well. In support of which we quote from Hurd's Ill. Stat. as follows:

Section 71, Chapter 114, Hurd's Statutes, provides:

"Hereafter, at all of the railroad crossings of highways and streets in this state, the several railroad corporations in this state shall construct and maintain said crossings and the approaches thereto, within their respective rights of way, so that at all times they shall be safe as to persons and property."

Sections 72, 73 and 74 of the same chapter are as follows:

"72. Neglect to Make, etc., Crossings—Notice.) Whenever any railroad corporation shall neglect to construct and maintain any of its crossings and approaches, as provided in Section 8 of this act, it shall be the duty of the proper public authorities, having the charge of such highways or streets, to notify in writing, the nearest agent of said railroad corporation of the condition of said crossing or approaches, and direct the same to be constructed, altered or repaired in such manner as they shall deem necessary for the safety of persons and property.

"73. When Company Neglects, Authorities to Construct, etc.) Sec. 10. If any railroad corporation of this state shall, after having been notified, as provided in Section 9 of this act, neglect or refuse to construct, alter or repair such crossing or approaches within thirty days after such notice, then said public authorities shall forthwith cause such construction, alteration or repairs to be made.

"74. Company to Pay Expense and \$100.) Sec. 11. Said railroad corporation shall be holden for all necessary expenses incurred in making such construction, alteration, repairs, and in addition thereto shall be liable to a fine of \$100 for such neglect to comply with the requirements of this act, which fine shall be enforced by the said public authorities, in the name of the people of

the State of Illinois, before any court of competent jurisdiction in the county. Such fine, when collected, to be paid into the treasury of the authorities enforcing the fine."

So that, in view of all the conditions and provisions bearing upon the construction and maintenance of the 18th street viaduct, we are of the opinion that there is no liability on the part of the municipality, and we must accordingly disclaim the liability.

Yours very truly,
ALFRED O. ERICKSON,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Prevention of Boxing Exhibition.

October 20, 1921.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

In reply to your request for an opinion from the corporation counsel relative to the authority of the Police Department to prevent the boxing exhibitions advertised to be held on various dates at the Broadway Armory, 5875 Broadway, for the benefit of the First Artillery—Coast Artillery Corps—Anti Aircraft, permit us to say:

As we understand the facts, the Broadway Armory is owned by the Chicago Arena Company and controlled by the Illinois National Guard, who use it part of the time for their military drills, and the rest of the time rent it out to anybody desiring the same. We understand also that they have now rented out the armory for the dates in question to the other military companies who are to give the entertainments in question. The first question then is, are such entertainments, given by such parties and under such circumstances, subject to the police authority of the city?

Section 15 of Article II of our State Constitution says:

“The military shall be in strict subordination to the civil power.”

It is only when the militia are acting in the discharge of their military duties, or are otherwise in the active service of the state, that the statute allows them any immunity from ordinary police regulations.

Military Code, Art. XX, Sec. 11.

The statute provides:

“The armory of each regiment, battalion, company, ship’s crew or division shall be subject to the order of the adjutant general and be under the charge of its commanding officer.”

Military Code, Art. XVIII, Sec. 3.

Assuming that this section would give such commanding officer exclusive jurisdiction over an armory (which it does not say) it is nevertheless manifest, that it applies only while the building *is* an armory. If it is sold or rented out (which in law is equivalent to a temporary sale), it passes out of the control of such commanding officer. Thus, if an armory is rented out for public entertainments by private parties (with or without actual payment of rent), it ceases, for the time being, to be under the control of the military commander, or to be an “armory” in a legal sense.

Moreover, it is no part of the military duties of the military forces, either of this state or of the United States, to engage in the business of giving public entertainments, and whenever any officers or enlisted men do engage in such enterprises, they do so in their *private capacity*, as ordinary citizens, and are accordingly subject to the same police regulations as any other citizens.

That such boxing contests are forbidden by the laws of this state we need not tell you. But for your convenience we quote herewith the statute (Sections 235 and 236 of the Criminal Code):

“Sec. 235. Whoever instigates, carries on, promotes or engages in as a witness, any sparring or boxing exhibition, shall be fined not exceeding \$500, or confined in the county jail not exceeding six months,

“Sec. 236. Any person who shall, upon complaint made before any judge or justice of the peace, appear to be about to engage in any such fight or sparring or boxing exhibition, may be compelled to enter into bond with security to keep the peace, as in other cases of threatened breaches of the peace.”

For the reasons above set forth we are of the opinion that the contemplated boxing exhibitions are unlawful, and that your department has authority to prevent the same.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Keeping Division Fences in Repair.

October 26, 1921.

MR. THOS E. SKAHEN, 2900 W. Madison Street.

Dear Sir:

Replying to your request for information from the corporation counsel as to the duty of adjoining lot owners to keep division fences in repair, we beg to state that the city ordinances have nothing to say on the subject. The only fences that the ordinances attempt to regulate are fences bordering on a street or alley, and “spite” fences which obstruct light and air. As to other fences, the property owners are at liberty to make such arrangements among themselves as they choose.

We have read the opinions of the *Chicago Tribune* Law Department (published October 5 and 13), which you enclosed, and which are to the effect that adjoining lot owners must contribute equally to the repair of a division fence, and that if one lot owner finds the division fence to be out of repair, he may, after giving 60 days’ notice to his neighbor, rebuild the fence himself and sue his neighbor for one-half of the cost thereof.

We can not agree with that opinion. In the first place, we

deem it evident that the statute referred to in those opinions relates to rural communities and not to cities, as is evident from various provisions in the act, among others, the fact that it provides that the apportionment of fences and the enforcement of the statute generally shall be in the hands of certain "*Fence Viewers*,"—officers that do not exist in the City of Chicago.

Furthermore, even in rural communities, a property owner can not by merely serving a 60 day notice on his neighbor, acquire authority to go ahead and build a fence and then force his neighbor to pay half the costs. In the case of *Bigelow v. Burnside*, 269 Ill. 324, the plaintiff had pursued the very course that the *Tribune* Law Department advises, but nevertheless our Supreme Court held that it did not entitle her to recover. The court said:

"Appellant contends that Section 11, above set out in full, authorized the giving of the notice to appellees to repair or rebuild their portion of the fence, since the portion of each adjoining owner had been agreed upon and fixed, appellant assuming the responsibility of proving the necessity for repair or rebuilding, and that in such case the necessity of such repair or rebuilding need not be submitted to fence viewers. Reading the different sections of the statute with reference to each other we can not agree with appellant, but think *no person is liable to contribute to the repair or re-building of a division fence until there has first been a finding by fence viewers, legally chosen, that his proportion of the fence needs repair or re-building*. It clearly is not the only province of fence viewers to apportion or designate certain parts of a division fence to the adjoining owners, for by Sections 6, 8, 10 and 11 it clearly appears other questions may be submitted to and decided by them. * * * A finding by fence viewers of the need of repairs or rebuilding is a prerequisite to notice to build."

Bigelow v. Burnside, 269 Ill. 324.

This opinion by our Supreme Court seems to us to be clearly contrary to the above mentioned advice from the *Tribune* Law Department.

Since, therefore, under the Supreme Court's decision, there is no liability to repair or rebuild until the *Fence View-*

ers have so decreed, and since we have no such officials in Chicago, we are of the opinion that the statute has no applicability here. And, as we stated in the beginning, there is no ordinance on the subject.

Yours very truly,
 CARL J. APPELL,
Assistant Corporation Counsel.

Approved:
 SAMUEL A. ETTTELSON,
Corporation Counsel.

Exhibition of Prize Fight Pictures.

November 1, 1921.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

In reply to your request for an opinion relative to the legality of a requested permit for the exhibition of films of the Dempsey-Carpentier prize fight, we submit the following:

Par. 45 of Sec. 1, Art. V, of the Cities and Villages Act gives the City Council power

“to prohibit the sale or exhibition of *obscene or immoral* publications, prints, pictures or illustrations.”

In pursuance of this statute the City Council enacted Section 1627 of The Chicago Code of 1911, which, as later amended, reads as follows:

“1627. *Immoral pictures—permit not to be granted.* If a picture or series of pictures for the showing or exhibition of which an application for a permit is made, is *immoral or obscene or portrays any riotous, disorderly or other unlawful scene*, or has a tendency to disturb the public peace, it shall be the duty of the general superintendent of police to refuse such permit; otherwise it shall be his duty to grant such permit.”

It may seem, at first blush, that the language of the ordinance is broader than that of the statute. But since, of course, the City Council can exercise no broader powers than the Leg-

islature has seen fit to confer upon it, any ordinance in excess of such powers would be unconstitutional and void.

City of Chicago v. Ross, 257 Ill. 76.

City of Chicago v. M. & M. Hotel Co., 248 Ill. 264.

People v. Village of Oak Park, 268 Ill. 256.

In order to uphold the validity of the above ordinance, therefore, it is necessary to limit it to the same meaning as the statute has. Our Supreme Court so interpreted it in *Block v. City of Chicago*, 239 Ill. 251. Thus construed, the ordinance merely prohibits *obscene and immoral* pictures, and the important question in this case is whether pictures of a prize fight are obscene or immoral. No one, we take it, will contend they are "obscene." Are they otherwise "immoral?"

In the case of *Block v. City of Chicago*, 239 Ill. 251, our Supreme Court considered the above statute and ordinance, and held that pictures representing the "James Boys" and portraying "malicious mischief, arson and murder," were immoral. But they gave no comprehensive definition of the word, but contented themselves by saying (p. 264):

"The average person of healthy and wholesome mind knows well enough what the words 'immoral' and 'obscene' mean and can intelligently apply the test to any picture presented to him."

In other words, as the court also said further on in the opinion, the terms "obscene" and "immoral," as used in the above statute and ordinance, must be understood in their ordinary, popular sense—"in accordance with the generally accepted meaning of the words." That will hardly include prize fighting, for we do not believe that the average intelligent person will classify prize fighting as either *obscenity* or *immorality*. It belongs rather to that class of crimes known in law as *mala prohibita*, or acts which, while not necessarily evil in themselves, nor forbidden by the common law, are forbidden by statute, and which are to be distinguished from *mala in se*, or acts evil in themselves, which were recognized as crimes by the common law, as well as by the laws of all civilized nations.

In Vol. 5 of Words and Phrases, page 4315, we read:

“An offense *malum in se* is one which is naturally evil, as adjudged by the sense of civilized community, such as murder, arson, theft and the like. Bouv. Law Dict., *Hanauer v. Doane*, 79 U. S. (12 Wall.) 342; 20 L. Ed. 439. The offense of selling liquor without a license by an innkeeper is not *malum in se*. *Lewin v. Johnson* (N. Y.) 32 Hun. 408, 411. ‘*Malum prohibitum*’ is defined, to be an act made wrong by legislation—a forbidden evil. *Hatch v. Hanson*, 46 Mo. App. 323.”

Not all acts forbidden by law are *immoral*. To violate speed laws or building ordinances, for instance, is illegal, but nobody would think of calling it immoral. To be immoral an act must offend against some universally (or practically universally) recognized divine or moral law.

21 Cyc. 1736.

Blackstone, in discussing *mala prohibita*, says:

“Now, these prohibitory laws do not make the transgression a *moral offense*.”

Black. Com., Bk. I, p. 58.

In *Hanauer v. Doane*, 12 Wallace (79 U. S.) 342, the Supreme Court of the United States recognized that an illegal act involves moral turpitude only when it is a *malum in se*, as distinguished from a mere *malum prohibitum*; and that, we believe, is the generally accepted line of distinction, both at law and in the popular understanding, relative to the word “immoral.”

Now, prize fights, although prohibited by statute in most of the states, have never been regarded as *mala in se*. They were not forbidden by the common law, and even to this day, it is a matter of common knowledge that they are permissible in the State of New Jersey, and perhaps other states. Nor are they generally regarded as specifically forbidden by any universally recognized divine or moral law.

“The specific offense of prize fighting was unknown at common law.”

32 Cyc. 396,

quoting from the case of *John L. Sullivan v. State of Mississippi*, 67 Miss. 346.

We believe it is true, however, that prize fights are now generally regarded as coarse and brutal and offensive to the esthetic taste of the community, and that it is, therefore, proper for the state legislatures to forbid the same, if they see fit. Our Legislature has also seen fit to do so, and has enacted a statute (Secs. 231-236 of the Criminal Code) which forbids any person either to participate in a prize fight in this state or to make plans or preparations in this state for a prize fight to be fought elsewhere. That is the extent of the statute, however. It does not attempt to forbid prize fights outside of the state, nor to forbid citizens of this state to go outside of the state to witness a prize fight, nor does it forbid them to come back to this state and publish detailed accounts of such prize fights, in newspapers or elsewhere, nor to accompany such accounts with illustrations of certain scenes and events connected with such fight. Neither does the statute forbid moving picture exhibitions of such prize fights in this state nor authorize city authorities to forbid them. And it should be borne in mind that said statute being a part of the Criminal Code of this state, it must be *strictly construed*. It can not be extended by implication to cover anything that is not strictly within the letter of the statute, however appropriately it might come within the spirit of the same.

That the Legislature could, if they saw fit, forbid moving picture exhibitions of prize fights, or authorize city councils to forbid the same, we deem indisputable. But it is quite as certain that they have not as yet done so. This may be due to an oversight or it may have been intentional. Certain it is, that there are certain objectionable features usually connected with actual prize fights, which do not accompany a pictorial exhibition of the same; such as, for instance, betting and gambling and the assembling of rough and riotous crowds, etc. But whatever may be the *reason* that the Legislature have not legislated on this point, the important thing in the present instance is that they *have not* done it.

It may be conceded that motion picture exhibitions of a prize fight may have a tendency to encourage actual prize

fighting, and have a bad effect from an esthetic point of view. But the same is true, only perhaps in a less degree, of newspaper accounts of the same, with or without illustrations. Yet no one, we presume, will contend that such newspaper descriptions of prize fights, are unlawful. No doubt it would be competent for our Legislature to forbid both moving picture representations of prize fights and newspaper descriptions of the same. As yet, however, they have seen fit to do neither. Nor have they delegated to any municipal authorities the power to do so.

Even if we could constitutionally give the word "unlawful" as used in the ordinance a broader meaning than the words "obscene or immoral" as used in the statute, it is doubtful whether that would affect this case. For it will be noted that the prize fight in question in this case took place in New Jersey, where it was not even forbidden by statute—did not even constitute a *malum prohibitum*. Nor does a prize fight fought in New Jersey violate any statute of Illinois, either. A picture of such a fight is therefore a representation of an occurrence which, at the time and place it occurred, was perfectly *lawful*, so far as the laws either of New Jersey or of Illinois were concerned.

Reference is made, in the papers you submitted to us, to a Federal statute, which forbids the transportation from one state to another, by mail or otherwise, of films or other pictorial representations of prize fights. We can not see, however, that that statute has any legal bearing whatsoever on the present question. For clearly *transportation* from state to state is a different proposition from *exhibition* within a state. The one, being *interstate* commerce, is a subject for the Federal authorities to consider, while the other, being wholly *intrastate* business, is governed solely by state law.

We do not wish to be understood, from what we have stated above, to in any way impeach the authority of the Police Department to prevent actual prize fights or boxing contests. As we have heretofore advised you, you have full authority to take all necessary steps to prevent the same anywhere within the area of the city and its territorial waters. A

different rule applies, however, to moving picture exhibitions.

For the reasons above stated, we are of the opinion that there is nothing in the statutes of the state, nor in the ordinances of the city, authorizing you to refuse a license for moving picture exhibitions of the Dempsey-Carpentier prize fight, provided the exhibitions are otherwise conducted in an orderly and lawful manner.

Yours very truly,

CARL J. APPELL,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Ordinance Forbidding Automobiles, Except Those of the
Fire Department; to be Painted Red.**

November 8, 1921.

HON. THOMAS O'CONNOR, Fire Marshal.

Dear Sir:

Replying to your request for an opinion relative to the proper interpretation of the ordinance forbidding any automobile, except those of the Fire Department, to be painted red, we beg to say:

The power of the City Council to pass ordinances of this nature is derived from the general "police power" section of the Cities and Villages Act (Clause 66) which gives the City Council power:

"To regulate the police of the city or village, and pass and enforce all necessary police ordinances."

The term "police" power, as used in this statute, has a very broad meaning. Our Supreme Court defines it as follows:

"That power may be defined, in general terms, as comprehending the making and enforcement of all such laws, ordinances and regulations as pertain to the com-

fort, safety, health, convenience, good order and welfare of the public.”

Culver v. City of Streator, 130 Ill. 238.

Our Supreme Court has also specifically held that this section gives a city council power to pass all necessary *fire ordinances*.

Williams v. City of Chicago, 266 Ill. 267.

Chicago v. Mandel Bros., 264 Ill. 206.

Patterson v. Johnson, 214 Ill. 481.

In the *Williams case*, *supra*, the court also said:

“Cities, in enacting ordinances in the exercise of their police powers, must necessarily be allowed considerable discretion, and courts will not hold such ordinances void unless they clearly are so.”

The reason for the passage of the ordinance in question is as we understand, that permitting other vehicles to be painted the same “fire red” color borne by the vehicles of the Fire Department, causes confusion, which seriously interferes with the efficiency of the Fire Department, and hence increases the danger from fires within the city. If this theory is sound, we do not believe there can well be any question that the City Council has authority to pass such an ordinance.

But granting the constitutionality of the ordinance, there still remains the question of the proper interpretation of the same, for if interpreted so as to render it wholly arbitrary and unreasonable, its validity would still be subject to attack. The ordinance should, in our opinion, be interpreted so as to interfere as little as possible with *existing property rights*; which interpretation, we believe, disposes of all objections heretofore raised to the validity of the ordinance.

To require an owner of a car, who had already purchased the same before the adoption of the ordinance, to repaint the same might be considered unreasonable. Whether a dealer, who had a number of red cars in stock at the date of the ordinance, should be permitted to sell them in the city, is a little different question, depending somewhat upon the circumstances of the case, the number of cars in stock and the rela-

tive danger that such number of red cars would cause to an efficient conduct of the Fire Department, etc. These are matters of detail, however, which we believe should be left to the sound discretion of the superintendent of police, who is, by the terms of the ordinance, charged with the enforcement thereof.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Burglary and Robbery Insurance for Municipal Court Clerk.

November 17, 1921.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

We are in receipt of your letter of recent date concerning policies covering loss by burglary or robbery of funds in the custody of the clerk of the Municipal Court.

You state that you have withheld approval of certain bills for premiums because the insurance was approved by the clerk of the Municipal Court and not by the comptroller and that such procedure seems to be contrary to the law as indicated by both statutes and ordinances. The questions you ask are whether the said clerk has not exceeded his authority, whether the policies should run to and be payable to the City of Chicago, and whether the duty and responsibility of placing and approving rests with the city's fiscal officer, the comptroller.

It appears that the City Council this year made an appropriation to the clerk of the Municipal Court for this express purpose. (Council Journal, June 28, 1921, p. 591.) Such appropriation was not made for the year 1920, concerning which the question has arisen. Instead of that the council, by an order passed November 24, 1920 (Council Journal, p. 1111), undertook to authorize the payment of the bills

in question out of the fund appropriated for premiums to the comptroller in the appropriation bill of 1920. (See Council Journal, March 31, 1920, p. 2374.)

Hence, if the bills were incurred in 1921 we would have no hesitation in saying that the clerk was within his rights. There is some question as to the propriety of his incurring the expense in 1920.

Section 14 of the Municipal Court Act requires that, until otherwise provided by rule, "the powers, duties and liabilities, the oath of office and the bond and conditions thereof, of such clerk shall be the same, as near as may be, as those prescribed by law for clerks of courts by the act entitled," etc. Turning to the act referred to, we find that the act relating to clerks of courts provides that the bond of such clerks must be conditioned so that they are required to pay over money received by them as clerks to the parties entitled thereto, that they are responsible for the acts of their deputies, and that in general they can not escape liability in case of loss. Consequently, since the clerk is responsible for the safe keeping of the funds until turned over to the city, it would be entirely proper to have policies of insurance run to him. This view is further borne out by the fact that the clerk receives moneys that do not belong to the city for which he is likewise responsible.

There is a way left open under the Municipal Court Act by which the whole matter could be revised so that the clerk would be relieved of liability and the placing of the insurance could be made a city matter. But no action along this line has been taken.

The only question left is whether the action of the clerk last year, in incurring such an obligation without an antecedent appropriation, should be held illegal.

From a strict legal point of view the clerk had no right to incur this expense. The appropriation was made to the Department of Finance, so that the comptroller is the one who had the right to direct its expenditure. The attempt of the City Council on November 24, 1920, mentioned above, to transfer enough of the comptroller's appropriation to pay the

bills, was not, strictly speaking, within the powers of the City Council, the power to make transfers being limited to transfers within the department. (See Sec. 2a, Art. VII, Cities and Villages Act.)

On the other hand, it would seem as though the surety company could assert its claim on the theory that there was an appropriation that could be used for this purpose. In the case of *City of Chicago v. Berger*, 100 Ill. App. 158, suit was brought by a photographer who had done some work for the corporation counsel in connection with track elevation. The defense was made that all appropriations of the corporation counsel were exhausted. But it was shown that certain moneys had been deposited to the credit of the Bureau of Track Elevation, a portion of which, by order of the City Council, was transferred to the corporation counsel, to make good the deficiency caused by the track elevation expense. It was held by the court that this was not a diversion or change in object or purpose of the appropriation and that such transfer could lawfully be made, and that the money would then be spent for the purpose appropriated although through a different officer.

By the same process of reasoning it would probably be held that although there was much irregularity in the placing of the contract for insurance, nevertheless, the city availed itself of same, there was an appropriation for insurance premiums, and the contract was for a lawful purpose.

In view of this and other decisions which we might cite, we believe it would be unwise to contest the bills in question on the highly technical ground that the clerk made the contract with the surety company without an antecedent appropriation, and we recommend that the bills be paid.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Detailing of Police Officers to States Attorney.

November 19, 1921.

HON. SAMUEL A. ETTETSON, Corporation Counsel.

Dear Sir:

In compliance with your oral request for an opinion as to the power or right of the superintendent of police to assign or detail policemen to the office of the state's attorney and after such assignment, who has control of such policemen so detailed, I submit the following:

The first question in order that will be considered herein is, can the superintendent of police detail officers to the office of the state's attorney?

The office of the superintendent of police is almost entirely governed by Chapter 56 of The Chicago Code of 1911, as amended, which specifically lays down the rules, rights and powers of that office and its various branches. In addition to the express powers of the Code, the superintendent has also all those powers as are incidental or necessary to carry into effect the express powers. It therefore follows that he has that power that is either expressed by the Code or that which is necessary or incidental to carry the express power into effect. An "incidental power" exists only for the purpose of enabling a municipal corporation to carry out the powers expressly granted to it, namely, the powers necessary to accomplish the purposes of its existence.

Alton Mfg. Co. v. Garrett Biblical Institute, 243 Ill. 298.

For the same reason that a private or municipal corporation has "incidental power" so have the different functional bodies of such corporation "incidental power." It is true that a power is not incidental if it has only a slight or remote relation to the express power, but to come within the meaning thereof the proposed use of unexpressed power must be one that is directly and immediately appropriate to the execution of the specific power granted.

What relation has "incidental power" to the superintendent of police? Intelligence of man was never such that

it would foresee and anticipate for all future contingencies, particularly so, when it comes to legislation and if we were to govern ourselves only by that which is expressed, we would continuously be in a dilemma.

Sec. 1914 of The Chicago Code of 1911, as amended on March 10, 1920, provides as follows:

“The superintendent of police shall preserve and secure good order and cleanliness within the City of Chicago, and to that end he shall enforce all laws and city ordinances, and the orders of the City Council and of the mayor of the City of Chicago.”

The aforesaid section is not limited, but on the contrary leaves considerable power to be implied by the superintendent. When the council gives him power to “enforce all laws and such ordinances, and the orders of the City Council and of the mayor of the City of Chicago,” it is giving him a certain degree of discretion, and, if the acts of the superintendent of police are fairly within the scope of the expressed powers he is not guilty of violating his discretionary power. Is the assigning or detailing of police to the office of the state’s attorney within Section 1914 of the Code? So long as the officers that are sent to the office of the state’s attorney are sent there for the purpose of preserving the peace and secure good order, etc., within the corporate limits of the City of Chicago, and enforce its laws and ordinances, they are performing duties within the meaning and intent of the Chicago Code, and consequently, it follows that whatever will carry that into effect the superintendent of police may do. If the superintendent deems it advisable, necessary or proper to detail police to the office of the state’s attorney to further and carry out his oath of office he can legitimately do so and the same is not in violation of either the Illinois statute or the Chicago Code.

To come back to the particular case in question, I am not aware of the specific order or orders, if any, that were given to the officers that were assigned to state’s attorney, but it is certain that the officers were at least ordererd to perform their duties as are laid down in the Constitution of Illinois, statutes of Illinois, Chicago Code, and the rules and regulations of the Department of Police. That an officer should

perform and carry out the prescribed legal duties appertinent to his position, regardless what other orders might be given him to the effect that he should not fulfill such duties, is unquestionable, and further, is not considered here because it has been already elaborately discussed in another opinion.

Therefore, on the first question our opinion is in the affirmative and hence, the superintendent of police had a legal right to assign the policemen in question to the office of the state's attorney.

The next question is, who has control of the policemen that may be detailed to the office of the state's attorney? It must first be known what the order to the policemen was. Under ordinary circumstances an officer is subject to the control of the superintendent and as such can not and should not violate any orders of his superior. But in the case under consideration a disclosure of the facts indicate that the officers were assigned by telephone communication without any express order or orders as to what they were to do for the state's attorney. It naturally follows then that the officers were bound by the orders, rules and regulations of the Department of Police, subject, however, to the immediate control of the state's attorney.

A policeman remains a policeman within the meaning of the word wherever he might be sent, the only question that may arise is as to his specific duty and his jurisdictional powers. An officer is a conservator of the peace regardless to whom or where he is detailed. See Section 1918 of The Chicago Code of 1911, as amended, wherein it is provided in part as follows:

"No member of the police force shall be assigned to any duty other than strictly in the line of police work."

Nowhere in the Chicago Code is it clearly indicated that the superintendent of police is to have immediate control of the officers, nor does the Code in any instance forbid the temporary relinquishment of such control. The right of the superintendent to prescribe rules and regulations for the department is not questioned, but the inherent duties of an officer are prescribed in the Code by the City Council by vir-

tue of the statutory power conferred upon the City Council. This is clearly brought out in Section 1939 of the Chicago Code, providing in part as follows:

“The several members of the police force of the city, when on duty, shall devote their time and attention to the discharge of the duties * * * according to the laws and ordinances of the city, and the rules and regulations of the department, to preserve order, peace and quiet and enforce the laws and ordinances throughout the city. *They shall have power* to arrest all persons in the city found in the act of violating *any law* or ordinance or aiding and abetting in any such violation, and shall arrest any person found under circumstances which would warrant a reasonable man in believing that such person had committed or is about to commit a crime.”

The aforesaid section discloses that the different members of the Police Department have to enforce the laws as their own judgment would indicate or warrant. When they do that they are acting fully within the scope of their work. To the end of performing their duty, who shall have immediate control of the officers? There is nothing in the Code that expressly indicates the answer, but by a fair implication from the various sections read together in the light of other sections, the immediate superior has the immediate control of the different officers in the different ranks.

In the case under consideration the officers detailed by the superintendent of police to the office of the state's attorney were not given specific orders, and in my opinion, where they are so assigned without any definite duties to perform, other than those generally applicable to officers, a fair presumption is that they were to do that work which the state's attorney might ask them to do, so long as it is police work performed within the corporate limits of the City of Chicago. To hold a contrary view, would lead to one question, namely, why send the officers to the state's attorney's office at all if the state's attorney be denied to give them orders to carry out his proposed purpose? If there be any reason or purpose whatever in detailing police officers to the office of the state's attorney it must naturally be implied that the state's attorney be permitted to give the officers orders and the officers are

by law required to fulfill all those orders and requests to be performed within the City of Chicago, as the law prescribes them to execute.

The word "raid" is merely an expression of a combination of acts and in law is deemed merely a conclusion. It indicates action for a purpose. When the officers were making the so-called raids, they in effect were acting not for the state's attorney but for themselves, in compliance with the law, and after they know that a violation of the law exists and fail to do that which the law compels them to do, they would be dismissed from the force. After the raid a different element intervenes which is not within the scope of this opinion. However, I might add, that whatever knowledge the officers may obtain in making such raids is evidence and, by reason of the fact that the state's attorney is the chief prosecuting attorney of Chicago and Cook County, he alone is entitled to such evidence. To hold otherwise would be against public policy and although the case of *Vogel v. Gruaz*, 110 U. S. Reports 311, is not in point, it is, nevertheless, analogous, and is very important in so far as the question of public policy is concerned in reference to the disclosure of evidence that the state's attorney alone should know to administer justice.

There is one other difficulty to be encountered in this matter, and that is, where should the officers take persons apprehended in the commission of crime or a violation of the ordinances. Nowhere in the statute or Chicago Code is it provided that the criminals should be brought before the state's attorney, but on the contrary, it appears that they should be brought before some justice of the peace.

Chapter 38, Section 340, R. S. of Ill., 1919;

or be taken by such officer to some convenient branch of the Municipal Court.

Chapter 37, Section 312, par. 4th, R. S. of Ill., 1919.

But in view of the fact that it has been the long established custom to take violators of the law to the office of the state's attorney, there is no inherent wrong in continuing such practice, so long as the proper intent of the aforesaid sections of the Illinois statute are carried out. Furthermore, the tak-

ing of criminals to the office of the state's attorney can reasonably be construed, and in fact implied, as an incidental power to the expressed powers of the state's attorney. He has the power to prosecute. Clearly, he needs evidence to prosecute and to obtain such evidence the taking of criminals to his office is at least one satisfactory way of obtaining such evidence.

Therefore, I am of the opinion that the superintendent of police has the power to detail police to the office of the state's attorney and after they are so detailed, the state's attorney has the direct and immediate control of such assigned officers.

Yours very truly,
HARRY F. CHAVERIAT,
Assistant Corporation Counsel.

Regulation and Control of Public Motor Busses.

November 19, 1921.

HON. T. O. WALLACE, Chairman, Sub-Committee Local Transportation, City Council of Chicago.

Dear Sir:

Replying to your request for an opinion from the corporation counsel relative to the city's rights in the control of public motor busses, permit us to say:

Par. 42 of Sec. 1, Art. V of the Cities and Villages Act gives the City Council power:

“To license, tax, and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen and all other persons pursuing like occupations, and prescribe their compensation.”

Our Supreme Court has given this paragraph a liberal construction, holding that it will even include street cars.

Union Traction Co. v. City of Chicago, 199 Ill. 484.

However, the above power of cities was considerably curtailed by the Public Utilities Act of 1913 which gave the State Public Utilities Commission general supervision over all public utilities.

Hurd's Stat., Chap. 111a, Art. I, Sec. 8.

In determining what constitutes public utilities, the commission held, in the case of *Jacksonville Railway Company v. O'Donnell, doing business as Motor Transportation Co.*, Public Utilities Reports, 1915C, page 853, that a person or corporation operating motor vehicles for the transportation of passengers for hire, along *regular routes* and between *definite points*, was a public utility, and subject to the jurisdiction of the commission. The commission held in that case:

“From the evidence in this case, the commission finds that the respondent owns, controls, operates and manages within this state for public use, a number of automobiles which he is using for the transportation of persons for hire *between points* within this state, and that in the conduct of such business the respondent is a common carrier of persons, and is a public utility within the meaning of the act entitled, ‘An Act to provide for the regulation of public utilities,’ approved June 30, 1913, and that as such public utility the respondent is subject to the provisions of said act.”

The same principle was laid down in the case of *Newcomb v. Yellow Cab Co.*, P. U. R., 1916B, p. 983, and our Supreme Court has held the same.

Chicago Bus Co. v. Chicago Stage Co., 287 Ill. 320.

People v. Chicago Motor Bus Co., 295 Ill. 486.

Public Utilities Com. v. Bus Line, 290 Ill. 574.

The same principle has been announced in other states, where similar public utility laws have been enacted.

Georgia R. & P. Co. v. Jitney Bus Co., P. U. R., 1915C, 928.

Smith v. Nunnally (W. Va.), P. U. R., 1915E, 177.

Re Jurisdiction over Motor Bus Lines (D. C.), P. U. R., 1915E, 642.

Re Auto Stage Lines (Arizona), P. U. R., 1915C, 945.

Re Regulation of Jitney Busses (Md.), P. U. R., 1915C, 365.

The basis of the above distinction between motor busses and hackmen is thus explained in the case of *Georgia R. & P. Co. v. Jitney Bus Co.*, *supra*:

“The business carried on by respondents is not that of hackmen. The latter have no definitely fixed routes or charges. Practically every service rendered by them is a special service rendered to an individual or individuals. Until called into service a hackman cannot know in advance what it is nor the charge which may be reasonably made therefor. He undertakes, under a special contract, to deliver his patrons at a particular destination, to be designated by the patron. The vehicle for the time is exclusively for his use, and without his consent no one else can enter it.

“The jitney, on the contrary, has its regular fixed route; its charge is fixed; it is the same for any distance over that route, whether only a fraction or the whole of it; the passenger can not demand transportation to a point not on this route; he has no exclusive right to the use of the vehicle for any distance or for any period of time; the carrier, so long as he has room, must take on every one who desires transportation on that route, subject of course to reasonable rules and regulations. The service offered and rendered is common to all the public, and available to all, under reasonable rules and regulations, who desire it. It renders substantially the same service to the public that the electrically driven trolley car performs. The need for regulation is far more apparent than in the case of a hackman. Engaged in the same business of urban street transportation, alongside and in direct competition with the trolley car, and with a volume of traffic by no means inconsiderable, it is not apparent that there is less need of regulation than there is for the trolley.”

It is apparent, therefore, that while the Public Utilities Act of 1913 was in force, the charter power of the city to regulate motor busses was somewhat limited. At the last session of our State Legislature, however, an act was passed repealing the State Public Utilities Act of 1913, and abolishing the State Public Utilities Commission, and creating a new body known as the *Illinois Commerce Commission* with certain of the powers of the old State Public Utilities Commission, but giving the cities of the state the power to regulate their own local public utilities. The article granting such power to cities, contains, however, this section:

“§85. This article shall not be in force in any city until the question of its adoption shall first have been submitted to the legal voters of such city and approved by a majority of those voting at such election. Until this article has been adopted and approved by the voters of such city the Illinois Commerce Commission shall be vested with all the powers and jurisdiction conferred by this act as to public utilities within such city.”

An Act concerning Public Utilities, Sec. 85, Session Laws of Illinois of 1921, page 751.

As you are aware, the provisions of the article in question have not as yet been submitted to and adopted by the voters of the City of Chicago, and, therefore, the city has not yet been restored to its full charter powers in this respect.

But when the Public Utilities Act of 1913 gave to the State Public Utilities Commission “*general supervision* of all public utilities,” it did not thereby give it *exclusive jurisdiction* over the same. This is well illustrated by the street railways, which unquestionably constitute a public utility, and for that reason clearly come under the general supervision of the commission, but which nevertheless cannot lay any tracks, etc., in the streets of any city without the consent of such city. This is due in part (but not entirely) to a constitutional provision, which reads as follows:

“No law shall be passed by the General Assembly granting the right to construct and operate a street railroad within any city, town or incorporated village without requiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad.”

Illinois Constitution, Art. XI, Sec. 4.

It may well be argued that motor bus lines operating regular routes are street railways, within the meaning of this provision of the Constitution. They certainly serve the same purpose as trolley lines, and are active competitors of the same, as stated in some of the cases above cited. And in the case of *Union Traction Co. v. City of Chicago*, 199 Ill. 484, our Supreme Court held that the fact that one vehicle runs on a track and another runs on the street without a track, is not a material distinction so far as the right of regulation and

control by the city is concerned. If a motor bus line is a street railway, therefore, any law which would permit it to operate upon the streets of a city without the consent of such city, would clearly be, to that extent, unconstitutional.

But granting the constitutionality of the Public Utilities Act of 1913 in all its details, there is no provision in the same which, in our opinion, empowers the commission to authorize any motor bus company to operate on the streets of any city, without the consent of such city. Their powers seem to be confined to regulating and prescribing *how* such utilities shall operate, what fares they may charge, what facilities and safeguards they must furnish, etc. The commission can *prevent* a utility from operating without its consent, but we find nothing in the act authorizing it to foist a utility upon any municipality without the consent of such municipality, especially where the municipality already has fixed statutory rights in the matter.

In *Chicago & So. Traction Co. v. I. C. R. R. Co.*, 246 Ill. 146, where the relative powers of a city and the Railroad and Warehouse Commission were considered, it was held that a city could give the railroad company the right to operate in its streets, while the commission could prescribe *how* they should operate.

The City of Chicago has broad general powers to regulate the use of its streets.

Cities and Villages Act, Art. V, Sec. 1, Par. 9.

Under this grant of power it has been held that the city has power to limit the use of certain streets to certain classes of vehicles.

Cicero Lumber Co. v. Town of Cicero, 176 Ill. 9.

Spiegler v. City of Chicago, 216 Ill. 114.

Malleable Iron Co. v. Park Commissioners, 263 Ill. 446.

Thus, in *Cicero Lumber Co. v. Cicero*, *supra*, the court said:

“There is nothing unreasonable in excluding traffic teams from a street designated and intended to be a pleasure driveway. Such driveway must be constructed

and paved in a particular manner; and if heavy teaming is allowed, injury would result and frequent repairing would be necessary."

In *City of Chicago v. Collins*, 175 Ill. 445, our Supreme Court said:

"The City Council may regulate the use of the streets and alleys to the extent that it may require sidewalks exclusively reserved for use by pedestrians, and *exclude certain character of loads* and regulate the width of tires on vehicles used on a certain character of pavement, and provide that the rate of speed shall be much less on certain streets than on others, *and otherwise regulate* the use of the streets, having in view solely the welfare and safety of the public."

Under the Motor Vehicle Act, the city has been given the following additional powers:

"Incorporated cities, having a population of more than 10,000 inhabitants, may designate certain streets or boulevards as *preferential traffic streets*, and prescribe rules regulating traffic upon, crossing over, or turning into such streets or boulevards."

Motor Vehicles Act of 1919, Sec. 33.

It will be noted that this last act was passed after the date of the Public Utilities Act of 1913, and if the two are inconsistent, the latest act will have to prevail.

We understand that the Motor Bus Company claims to be operating under a certificate from the State Utilities Commission and a franchise from the Lincoln Park Commissioners, granting the right to use the boulevard, and that the company takes the position that no franchise or consent from the city to use its streets is necessary. Why it should have deemed it necessary to secure a franchise from the Lincoln Park Commissioners, if it did not need one from the City of Chicago, is not quite clear. For if, as the company seems to contend, the Utilities Commission has completely superseded the authority of the city, it has just as completely superseded that of the Lincoln Park Commissioners. On the other hand, if the Lincoln Park Commissioners can exclude the Motor Bus Company from the park and boulevard, unless

it first applies for and obtains a franchise, the City of Chicago has the same right so far as its streets are concerned. By applying for a franchise from the Lincoln Park Commissioners, the Motor Bus Company virtually recognizes that a certificate from the Utilities Commission alone is not sufficient to authorize the company to use the streets for its business.

Our State Public Utilities Commission also held that it had no authority to determine the question whether a public utility has any right to operate within a city at all, or not.

Belke v. B. & O. Chicago Term. R. Co., P. U. R., 1920 E, 509.

And in other states with similar public utilities laws, a clear distinction is drawn between the power to grant a public service corporation the right to operate on the streets of a city, and the power to regulate it afterwards. The Public Utilities Commission of Arizona, or, as it is there called, the *Corporation Commission*, says:

"It is now the law, and we believe it has always been in this jurisdiction, that the right to grant franchises to public utilities to occupy the streets and alleys of incorporated cities and towns is vested in the municipal authorities. The grant of the franchise in this case was by the City of Phoenix. We discover no purpose in the Public Service Corporation Act to change or modify that rule; the right to enter upon and occupy the streets by a public utility being controlled by local authorities. It is after the public utility has secured its rights and privileges and franchises, including those of occupying the streets and alleys of a municipality, that the power of supervision over the public utility by the Corporation Commission is intended to be operative and controlling."

Phoenix Railway Co. v. Lount, P. U. R., 1920D, 186

It appears also that the certificate of necessity and convenience, secured by the Motor Bus Company from the State Public Utilities Commission, was not unconditional. At any rate the Supreme Court informs us:

"In December, 1914, on appellant's (Chicago Motor Bus Company's) application and petition it was granted a certificate of necessity and convenience for the opera-

tion of motor busses over and upon all streets and public ways in the City of Chicago, *conditioned upon its obtaining the necessary license from the proper local authorities.*''

Chicago Motor Bus Co. v. Chicago Stage Co., 287 Ill. 320.

The court also informs us in that case that the company had secured a franchise from the Lincoln Park Commissioners, to operate over certain routes under their jurisdiction, on condition that they pay as compensation therefor: for the first five years three per cent of their gross annual receipts, but not less than \$10,000 a year; for the second five years, three and a half per cent of their gross annual receipts, but not less than \$11,000 a year, and for the last five years, four per cent of their gross annual receipts, but not less than \$12,000 a year.

In the case of *People v. Chicago Motor Bus Co.*, 295 Ill. 486, our Supreme Court held that the Lincoln Park Commissioners are a *municipal corporation*, and, as such, have plenary power and authority over the boulevards and streets under their control, and that a municipal corporation may require contribution from a public service corporation for the use of streets.

The court said:

''A municipality * * * does have the power to impose such conditions for a grant of the use of streets as it may deem for the best interest of the public, and may for that purpose require a contribution from a public service company for the grant of authority to use the streets. * * * The park commissioners had the right to require a reasonable contribution as a regulatory provision and for damages to the streets.''

As the City of Chicago is certainly no less a municipal corporation than are the Lincoln Park Commissioners, the above decision applies with equal force to the city, as to any streets under its control.

For the reasons above set forth, we are of the opinion that while the Illinois Commerce Commission still has jurisdiction over motor busses, *as a public utility*, and may prescribe rules as to *how* they are to be operated, the rates of

fare, etc., the city has jurisdiction over its *streets*, and has full authority to make any reasonable regulations, prescribing on what streets any specified class of vehicles may run, and the terms and circumstances under which they may do so. Whether we designate this power as a power to "license" motor busses, or give it some other name, is merely a matter of phraseology. The right clearly exists, and it is based upon the power of the city to control and regulate the use of its streets.

Yours very truly,

CARL J. APPELL,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Removal of Poles and Wires.

November 26, 1921.

HON. W. H. REID, Commissioner of Public Service.

Dear Sir:

Replying to your request for an opinion from the corporation counsel relative to whether you can require the Commonwealth Edison Company to remove their poles and overhead wires in the vicinity of 102d street and Seeley avenue and substitute underground conduits, we beg to state that the franchise of the company specifies a certain district in which the company may be required to lay their wires in underground conduits, and provides that outside of that district it may erect a system of poles in any of the streets and alleys, and place their wires, conductors and cables thereon.

Sections 2 and 3, of the franchise of the Commonwealth Edison Company, read in part as follows:

"Terms and conditions.) Section 2. All such lines of wire or other electrical conductors, except those passing through the tunnels or upon viaducts within the following boundaries, namely: Commencing at the intersection of the lake and North avenue, thence west on North

avenue to Wells street, south on Wells street to Lake street, west on Lake street to Ashland avenue, south on Ashland avenue to Sixteenth street, east on Sixteenth street to Butterfield street, south on Butterfield street to Fifty-fifth street, east on Fifty-fifth street to the lake, shall be placed in underground conduits. Said company shall at all times place and keep on file with the commissioner of public works plans showing the location of each conduit laid and number of ducts and wires in each conduit, and upon laying any new conduit, said company shall file with the commissioner of public works a plan showing where each conduit is laid, the location of man-holes or other openings to gain access to said conduit, and each cover for such opening shall have placed thereon the name of said company.

“Outside system.) Section 3. The said company may, outside of the district above described in Section 2, erect a system of poles and wires thereon in any of the streets and alleys in Chicago, and over buildings, with the consent of the owners thereof, and in going from one building to another, if necessary, said company may cross streets, alleys, sidewalks and city property, but before any such poles shall be so placed, the plans thereof shall be filed with the commissioner of public works.”

You will note that the poles and wires involved in this case are clearly outside of the district within which the company is required to install underground conduits.

The use of the streets for poles, wires and other necessary apparatus of a public service company, is one of the proper uses to which a street may be put, and therefore a property owner has no right to object to the same, provided it has otherwise been done in a careful and proper manner.

McWethy v. Aurora Electric Light & Power Co., 202 Ill. 218.

People v. Kewanee Light Co., 262 Ill. 255.

Chicago Mun. Gas. Light Co. v. Town of Lake, 130 Ill. 42.

City of Quincy v. Bull, 106 Ill. 337.

In *McWethy v. Aurora Electric Light Co.*, 202 Ill. 218, our Supreme Court said:

“These uses are all of a public nature, and are not inconsistent with the public use to which the streets were

dedicated. Under its general power to regulate the use of streets the city has authority to authorize corporations and persons, for the purpose of serving the public, to string telegraph, telephone or electric wires upon poles above the surface of the streets, provided such construction and mechanical appliances do not materially interfere with the ordinary uses of the streets and public travel thereof."

And in *People v. Kewanee Light Co.*, 262 Ill. 255, the court said:

"The City Council might grant the use of the streets, alleys and public grounds of the city for the laying of gas or water mains, or the erection or maintenance of electric wires for lighting, or for telegraphs or telephones, *without regard to the consent or wishes of abutting property owners.*"

And in *City of Vandalia v. Postal Telegraph Co.*, 274 Ill. 173, the Supreme Court held that after a city has granted a public service company the right to place poles in street and maintain its electric wires thereon, the city had no right to order the poles removed and the wires placed in underground conduits, merely for the purpose of beautifying the street.

For the reasons above stated, we are of the opinion that you have no authority to require the Commonwealth Edison Company to remove the poles in question and substitute therefor underground conduits.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Inspection of Air Tanks on Street Cars.

November 29, 1921.

HON. GEO. E. NYE, Chief Inspector, Dept. of Inspection of Steam Boilers.

Dear Sir:

We have your request for an opinion from this office as to the right of your department to inspect the air tanks on

street cars, and in reply will say that, we are of the opinion that these tanks come under the provisions of the ordinances in regard to steam boilers.

Section 2393 of The Chicago Code of 1911 states:

"The provisions of this article relating to the inspection of steam boilers, generators or other apparatus carrying other than city pressure shall be held to apply to such steam boiler, generator or apparatus in use or installed in any steam roller, steam derrick, steam pile driver, automobile or other movable structure or contrivance of any kind whatsoever used within the city."

This language, in our opinion clearly includes street cars, etc., within the meaning of this ordinance. Nor do we find anything in the franchise granted the street car companies by the city, which in any manner exempts them from such inspection.

Section 37 of the franchise ordinance of 1907 reads as follows:

"Section 37. Nothing in this ordinance contained shall be construed as depriving the said city of the right of exercising any police power which it would have possessed or enjoyed had this ordinance not been granted.

"The enumeration herein of special requirements and specific regulations shall not be taken or held to imply the relinquishments by the said city of its power to make other requirements or regulations, and the said city hereby expressly reserves the right to make all regulations which may be necessary to secure in the most ample manner the safety, welfare and accommodation of the public, including among other things the right to pass and enforce ordinances to protect the public from danger or inconvenience in the management and operation of street railways throughout the said city and the right to make and enforce all such regulations as shall be reasonably necessary to secure adequate and sufficient street railway accommodations for the people and insure their comfort and convenience.

"The said Council may vest any or all matters of administration under this ordinance, including such thereof as are herein vested in the mayor, comptroller or other city officials named in this ordinance or in said "Exhibit B" attached hereto (but excepting those herein vested in said Board of Supervising Engineers), in a Department

of Bureau of Local Transportation, or in its city engineer or in any official or employes of said city.”

For the reasons above stated, we are of the opinion that your department has the authority to inspect the air tanks located on street cars.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Ordinance Limiting Use of Lot Areas in Building.

November 30, 1921.

HON. WM. R. O'TOOLE, Chairman, Committee on Building and Zoning.

Dear Sir:

You forwarded to this department copy of a proposed ordinance limiting the use of lot areas, which your committee has under consideration, with a request for an opinion as to the validity of same.

The ordinance in question provides that in any block used exclusively for residential purposes where two-thirds of the existing buildings occupy not to exceed 35 per cent of their respective lot areas and the other one-third of such buildings not to exceed 60 per cent of their respective lot areas, it shall be unlawful to erect any new building which shall occupy more than 35 per cent of lot on which it is to be constructed, unless written consent of the owners of the major portion of the frontage on the same side of the street in such block is first obtained.

Questions relating to the rights of owners of real estate when it was proposed to erect a building of a certain kind or to be used for a certain business or occupation have frequently arisen in this state, but it appears that this is the first time that a similar question has come up which relates entirely to the intensity of the use of lot areas.

Limitations on the use of lot areas have been imposed by ordinance for many years, and the right of the city to exercise such control has been conceded, although no express power was granted to municipalities in this respect until 1919. The right to make restrictions of this kind was based on powers granted under the general health clause and such additional power as might be gathered from the clause which gave municipalities the right to prescribe the manner of constructing buildings.

By the Zoning Act of 1919, and by the act of 1921 which later replaced it, the city is given express power to "regulate and limit the intensity of the use of lot areas, and to regulate and determine the area of open spaces within and surrounding buildings."

It will thus be seen that whatever power the city possessed in this regard prior to the passage of the Zoning Act, such power was amplified and more expressly defined by that act. Whether such express delegation of power is precise enough to do away with the question of reasonableness in ordinances passed thereunder need not be discussed, and we will assume in this opinion that such ordinances must withstand the test of reasonableness.

The question of whether or not such an ordinance as is proposed is valid would be less difficult if it were not for a provision in Section 2 of the Zoning Act which seems at first blush to indicate that, before the city can avail itself of the additional powers granted, it must embody what it requires in a comprehensive zoning ordinance. The words that give rise to this point are as follows:

"The City Council in cities and the president and Board of Trustees in villages and incorporated towns, which desire to exercise the powers conferred by this act, shall provide for a zoning commission whose duty it shall be to recommend the boundaries of districts and appropriate regulations to be enforced therein, such commission to be appointed by the mayor or president of the Board of Trustees, subject to confirmation by the Council or Board of Trustees."

While there is much ground for doubt as to whether this is intended to relate to the exercise of the powers granted

in anything but an ordinance passed with all the formalities required for a comprehensive zoning scheme, we have come to the conclusion that the power as to the particular thing in question is granted in such a way that this ordinance will stand. In other words, it is a severable provision which can be maintained independently whether anything else is done under the act or not.

We come to this conclusion because all the provisions of the Zoning Act which follow the sentence last quoted relate to the division of the city into districts which shall have certain distinctive characteristics, while the power delegated in respect to intensity of use of lot areas does not necessarily have to do with districting, and, in any event, such power is first given before anything is said about districting in the enumeration of powers.

In order to explain more fully what we mean, we quote the following sentence from Section 1 of the Zoning Act:

“To regulate and limit the height and bulk of buildings hereafter to be erected; to regulate and limit the intensity of the use of lot areas, and to regulate and determine the area of open spaces, within and surrounding such buildings; to classify, regulate and restrict the location of trades and industries and the location of buildings designed for specified industrial, business, residential and other uses; to divide the entire city, village or incorporated town into districts of such number, shape, area and of such different classes (according to use of land and buildings, height and bulk of buildings, intensity of the use of lot areas, area of open spaces, or other classification) as may be deemed best suited to carry out the purposes of this act; to fix standards to which buildings or structures shall conform therein; to prohibit uses, buildings or structures incompatible with the character of such districts respectively; and to prevent additions to and alteration or remodeling of existing buildings or structures in such a way as to avoid the restrictions and limitations lawfully imposed hereunder.”

It will be noticed that the clause on which we are relying is the second clause given in the above excerpt. While the power to divide the city into districts is the fourth clause and the power to regulate the intensity of use of lot areas is

given in that clause also. In other words, it would have to be assumed that there is a repetition of this power unless the act was construed so as to mean that the power to regulate and limit the intensity of the use of lot areas was given in the one case independently of the power to district, and in the other case it was included in the power to district.

Having come to this conclusion with respect to the power granted in this particular in the Zoning Act, we are of the opinion that we can safely rely on the reasoning of Justice Kramer in the case of *State ex rel. Morris v. Osborn*, 18 Ohio Law Reporter 22. The decision in that case was on the question as to whether tenement buildings could be excluded from certain restricted areas in a zoning ordinance which provided for districts to be used only for single and double residence purposes.

Justice Kramer said, among other things:

"As a matter of common knowledge, of which the court may take judicial notice (16 Cyc., 582) it (the apartment house) shuts off the light and air from its neighbors, it invades their privacy, it spreads smoke and soot throughout the neighborhood. The noise of constant deliveries is almost continuous. The fire hazard is recognized to be increased. The number of people passing in and out, render immoral practices therein more difficult of detection and suppression. The light, air and ventilation are necessarily limited, from the nature of its construction. The danger of the spread of infectious disease is undoubtedly increased, however little, where a number of families use a common hallway, and common rear stairways. * * *

"With the growth of its population, it appears to be practically certain that unless restricted, the greater part of East Cleveland will be built up with apartments, and the home owners must choose either to adopt apartment life or abandon their depreciated property, and move out of the city or into its more remote parts.

"If the claim of the relator here is sound, a city of private homes, grass plots, trees and open spaces, with the civil pride and quality of citizenship which is usually found in such circumstances, is powerless to protect itself against the obliteration of its private residence districts, by apartments, which shut out the sun and sky from its streets, and one another, and are generally owned

by those whose greatest interest is in the revenue that the building will produce. If such is the law, it must be conceded that it is unfortunate. * * *

"It seems eminently fair to restrict the apartment builder to a limited area, where his use of his property will do the least damage to others, and to the community. The necessities or conveniences of those who live in them will be served thus with the least sacrifice of the necessities and convenience of others. Whatever of the burden arising from apartments there are, will be borne by those whose purposes they serve, and not shifted to the other property owners of the town, to make their property unfit for use as a home."

While in the present instance the limitation of the use of lot areas has apparently nothing to do with the construction of tenement buildings, nevertheless, we believe that the main argument that will be used will be to the effect that by the ordinance before us flat buildings will not be permitted in the restricted blocks, and that no good reason exists for making such a discrimination. It is in anticipation of this argument that we quote so liberally from the decision referred to above.

We have, therefore, come to the conclusion that the said ordinance can be sustained as a proper exercise of the police powers of the city.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTTELSON,
Corporation Counsel.

**Contracts Entered Into by Authority of the Finance
Committee.**

December 5, 1921.

HON. WILLIAM HALE THOMPSON, Mayor.

Dear Sir:

You submitted to us five contracts which had been sent to you for approval, with the request that we advise you

whether it is lawful to enter into same under authority granted by the Finance Committee.

Said contracts are as follows:

Ingersoll-Rand Company of Illinois for furnishing and delivering fifteen No. 248 Leyner drills. Estimated liability, \$5,475; authority granted by Finance Committee September 21, 1921.

The Jeffrey Manufacturing Co., for furnishing and delivering two 42-in. x 48-in. Type B Pulverizers at the Municipal Reduction Plant. Estimated liability, \$9,660; authority granted by the Finance Committee September 15, 1921.

Commonwealth Edison Co., for installation of additional power cable to tunnel shaft at 61st street and Western avenue. Estimated liability, \$4,099.07; authority granted by the Finance Committee September 28, 1921.

Fitzsimons & Connell Dredge & Dock Co., for dredging required in the draw of the Michigan Boulevard Bridge. Estimated liability, \$4,000; authority granted by the Finance Committee October 18, 1921.

Hyatt Roller Bearing Company, for furnishing and delivering 800 Roller Bearings No. 28505. Estimated liability, \$3,534; authority granted by the Finance Committee October 24, 1921.

The statutory provision relating to the letting of contracts amounting to \$500 or more appears in Section 50 of Art. IX of the Cities and Villages Act. This section requires that any work or other public improvement, other than that to be paid for by special assessment, when the expense thereof shall exceed \$500, must either be constructed by contract let to the lowest responsible bidder in the manner prescribed by ordinance, or it may be entered into by the proper officers without advertising for bids by a vote of two-thirds of all the aldermen elected.

While the statute limits this requirement to "work or other public improvement," the ordinances passed by the City Council concerning the letting of contracts and following the same rule extend these provisions to all contracts including those for materials and supplies. (See Section 2104, Chicago Code of 1911.) Neither the statute nor the ordinances contemplate the substitution of the Committee on Finance for the

City Council, and, moreover, so precise a provision as one that requires a vote of two-thirds of all the aldermen elected can not be ignored either by the officer making the contract or by the City Council itself. If it is done, and a contract is made which is not afterwards sanctioned by the City Council, the officer making such contract renders himself liable. Although there is no doubt about this whatever, nevertheless, contracts are frequently entered into in this way, especially during the period when the City Council takes its long recess.

You will observe from the dates given above that all of the five contracts mentioned were authorized during such a period. It appears that work would have been seriously delayed if the commissioner of public works had not taken the risk of going ahead on such authority as is stated. It so happens, however, that the Council on November 9, 1921, passed orders sanctioning all of these contracts. The one authorizing the Ingersoll-Rand Company contract appears on page 1225 of the Journal of the City Council; The Jeffrey Manufacturing Co. order on page 1230; the Commonwealth Edison Co. order on page 1235; the Fitzsimons & Connell Dredge & Dock Co. order on page 1236; and the Hyatt Roller Bearing Company order on page 1236. Consequently, while the letters of transmission sent to you do not state that the sanction of the City Council has been obtained, full authority has been granted in each case to enter into such contract by a two-thirds vote of all the aldermen elected.

We return herewith the contracts mentioned above and papers attached thereto.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTelson,
Corporation Counsel.

Liability of City for Flooding of Basement.

December 6, 1921.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

In compliance with your request for an opinion as to the legal liability of the city for damage alleged to have been suffered by the Atlas Furniture Company as a result of the flooding of the basement of its building at 432 S. Wabash avenue, July 18, 1921, I have thoroughly investigated the law, and also the facts, so far as shown by the records of the Department of Sewers and Bureau of Water Pipe Extension, and am of the opinion that no liability exists.

The records of neither the Sewer Department nor the Water Pipe Extension Bureau reveal any defect in the sewers or pipes in the vicinity of 432 S. Wabash avenue July 18, 1921. Therefore, the only reasonable presumption of fact is that the flood resulted from an extraordinary rainfall or some other extraordinary condition which the city was under no duty to guard against.

The law is settled that when a city undertakes to build a sewer, it becomes bound to use due care in constructing the sewer with reference to its size, fall and inlets; and that, if the sewer proves insufficient to adequately carry off the ordinary annual rainfalls, it may be inferred that there was a lack of such due care in the construction of the same. In such a case the city is therefore liable for damage resulting therefrom.

City of Litchfield v. Southworth, 67 Ill. App. 398.

Likewise the city is liable for damages due to overflow, where the overflow results from the drains and sewers having become obstructed by debris.

City of Aurora v. Gillett, 56 Ill. 132.

The city is not, however, required to anticipate extraordinary rainfalls, and consequently, is not liable for damage resulting from an extraordinary or unusual fall of rain.

City of Chicago v. Rustin, 99 Ill. App. 47.

Since the sewers in Chicago are undoubtedly constructed to adequately carry away the usual rains, and since there is no evidence that the sewers or pipes were out of condition, the case of *City of Chicago v. Rustin*, 99 Ill. App. 47, is in point and the city is not liable for the damage alleged to have been sustained by the Atlas Furniture Company.

Counsel for the Atlas Furniture Company seems to lay some emphasis upon the fact that the Fire Department failed to respond to his call for aid in pumping out the basement. Even if we assume that such a duty fell within the domain of the Fire Department, no recovery against the city can be predicated either upon the non-action or negligent action of the Fire Department, because that department performs a governmental function and the city is not liable for damages caused either by failure to perform a governmental function or for the negligent performance of such a function.

Dillon on Mun. Corp. (5th Ed.), 2893, Sec. 1660, citing a great number of cases.

Wilcox v. City of Chicago, 107 Ill. 334.

In *Wilcox v. City of Chicago*, *supra*, the court fully discusses the reasons for the rule on pages 338 to 340:

“On turning to the reported cases of the courts of other states, we find a uniform line of decisions holding that cities are not liable for the negligent acts of the officers or men employed in their fire departments whilst in the discharge of their duty, thus creating an exception in this class of cases to the general rule of *respondeat superior*. In his work on Municipal Corporations, Dillon (1st ed., Sec. 774), says: ‘So, although a municipal corporation has power to extinguish fires, to establish a fire department, to appoint and remove its officers, and to make regulations in respect to their government and the management of fires, it is not *liable for the negligence of the firemen* appointed and paid by it, who, when engaged in the line of their duty, upon an alarm of fire ran over the plaintiff, in drawing a hose reel belonging to the city, on their way to the fire; nor for injuries to the plaintiff caused by the bursting of the hose of one of the engines of the corporation, through the negligence of a member of the fire department. The exemption from liability is placed upon the ground that the service is

performed by the corporation in obedience to an act of the Legislature—is one in which the corporation has no particular interest, and from which it derives no special benefit in its corporate capacity; that the members of the Fire Department, although appointed by the city corporation, are not the agents and servants of the city, for whose conduct it is liable, but they act rather as officers of the city, charged with a public service, for whose negligence in the discharge of official duty no action lies against the city without being expressly given, and the maxim *respondeat superior* has, therefore, no application.’ He refers to the cases of *Hafford v. New Bedford*, 16 Gray, 297, and *Fisher v. Boston*, 104 Mass. 87, which support the text. In New York, the same doctrine is applied in *Maximilian v. Mayor*, 62 N. Y. 160, and *Smith v. Rochester*, 76 *id.* 513. In Connecticut, in the case of *Jewett v. New Haven*, 38 Conn. 368. In Iowa, in *Ogg v. Lansing*, 35 Iowa 495, and *Field v. Des Moines*, 39 *id.* 575. In Missouri, by *Heller v. Mayor*, 53 Mo. 159. In California, in *Howard v. San Francisco*, 51 Cal. 52. The same doctrine has been announced by the Supreme Court of Ohio.

In favor of the doctrine, it may be that an additional, if not more satisfactory, reason for its adoption and rendering it an exception to the general rule may be found in public policy. If liable for neglect in this case, the city must be held liable for every neglect of that department, and every employe connected with it, when acting within the line of duty. It would subject the city to the opinions of witnesses and jurors whether sufficient dispatch was used in reaching the fire after the alarm was given; whether the employes had used the requisite skill for its extinguishment; whether a sufficient force had been provided to secure safety; whether the city had provided proper engines and other appliances to answer the demands of the hazards of fire in the city; and many other things might be named that would form the subject of legal controversy. To permit recoveries to be had for all such and other acts would virtually render the city an insurer of every person’s property within the limits of its jurisdiction. It would assuredly become too burthensome to be borne by the people of any large city, where loss by fire is annually counted by the hundreds of thousands, if not by the millions. When the excitement is over and calm reason assumes its sway, it may appear to many where other methods

could have been adopted to stay destruction, that appear plausible as theories, and their utter fallacy can not be demonstrated by any actual test. To allow recoveries for the negligence of the Fire Department would almost certainly subject property holders to as a great, if not greater, burthens than are suffered from the damages from fire. Sound public policy would forbid it, if it was not prohibited by authority."

It therefore follows that the Atlas Furniture Company is not entitled to recover from the city on the claim presented.

Respectfully yours,
CHESTER E. CLEVELAND, JR.,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Proposed Ordinance Assigning Police Officers to State's Attorney.

December 6, 1921.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.
Dear Sir:

We are in receipt of your letter of the 6th ultimo in which you ask for an opinion as to the validity of a proposed ordinance amending Section 1918 of The Chicago Code of 1911 in such a way that a part of the police force of the city will be at all times assigned to and under the jurisdiction of the state's attorney of Cook County. We submit the following in reply thereto:

The amendment in question provides that the state's attorney may pick not to exceed forty police officers (not over the grade of sergeant) who shall be assigned to him for police duty, and in addition thereto such other officers of like rank to be designated by him as shall be deemed necessary by the mayor and superintendent of police or as may be deemed necessary by the City Council. It further provides that all members of the Police Department so assigned shall be under the direct command and control of the state's attorney and shall report to him alone in respect to their acts and doings.

The laws of the state seem to contemplate that there should be co-operation between the police of cities and villages and the prosecuting officers of the county, otherwise much of the work of both would be of no avail. Such co-operation has always existed to a greater or less extent through the understanding between the heads of these two branches of the government.

In addition to co-operation in the individual cases that have arisen, there have been members of the police force assigned to duty in the state's attorney's office by the chief of police for more than twenty years. During State's Attorney Deneen's administration two men were assigned to him. A like number were assigned to State's Attorney Healy. During the administration of State's Attorney Wayman he called for and obtained eight police officers whom he employed for the purpose of raiding the so-called red-light district. During State's Attorney Hoyne's term of office there were as many as twenty-five officers at a time detailed to him. The present state's attorney called for forty men, and these were assigned to him.

In every instance, however, the men were detailed by the head of the Police Department, who, under the ordinances of the city, had the sole discretion to determine where men were required for police duty and how many he would send there.

It is now proposed to do something in many respects different than anything that has been done before. The ordinance before us would take out of the hands of the head of the Police Department a part of the force provided for police duty, the men to be selected by another, and transfer them to a county officer, generally, without any specific assignment or direction as to duties to be performed, to act practically as employes of such county officer.

Such an innovation as this ordinance contemplates gives rise to many questions of law. They involve the powers of officers, matters of finance, civil service status and rights, authority over employes, effect of such an amendment on other sections of the code, and many other things that require

careful consideration and suggest problems that are difficult of solution. It amounts to more than a transfer of men—it would mean the transfer to the state's attorney of duties and functions which the law imposes on the superintendent of police.

While both the superintendent of police and the state's attorney are working to a common object in the matter of ferreting out and punishing crime and suppressing vice, their duties are distinct, the functions of their offices are different, and the law gives them powers along different lines. The state's attorney is a prosecuting officer, while the superintendent of police is a peace officer.

We do not believe it is necessary for us to be drawn into a controversy with the state's attorney in regard to his right to make raids on houses of prostitution and gambling houses. No doubt he has found authority which is satisfactory to him, and if he is supplied the means and the necessary men by the county authorities, such observations as we make in this opinion on his powers should not be understood as an attempt on our part in the remotest degree to define or point out the limits of his authority. But, since the assignment of forty or more men must be understood to mean that they are, among other duties, to be used for such raids, and since under our view of the law such work is the duty of the superintendent of police, we find it necessary, in giving our reasons for our attitude to point out the respective duties of the two officers.

The duties of state's attorneys are specifically defined by statute. They are set forth in eleven clauses, appearing in Section 5 of "An Act in regard to attorneys general and state's attorneys." The Legislature has passed many laws from time to time which impose specific duties or give specific powers to state's attorneys with reference to the subject-matter of such laws, but in every instance these duties and powers come squarely within the duties and powers enumerated in the section to which we refer. And nowhere do we find in said section or in any other statute authority to act as a peace officer or to make raids of the kind mentioned.

As early a case as *Whiteside Co. v. Burchell*, 31 Ill. 68, lays down the principle that the duties of the state's attorney are of a special and well defined character as set forth by statute, and this view has never been departed from by our Supreme Court. The latest pronouncement on this point which we have been able to find is as follows:

“His duty in criminal cases is limited to commencing and prosecuting cases in courts of record and attending before justices of the peace and prosecuting charges of felony, or misdemeanors for which the defendant is required to be recognized to appear before a court of record.”

People v. Newcomer, 284 Ill. 315-324.

Thus, it appears that the practice of making raids under the direction of the state's attorneys, which has sprung up in recent years is not based on any specific provision of the statute and has not been held to be one of the duties of the state's attorney by any decision of our highest court. He must necessarily act as the advisor of the sheriff, who is a peace officer under the statute and in that way may have much to do indirectly, with raids, but the power of county officers to make the raids seems to be lodged in the sheriff, just as the power to call out the *posse comitatus* is lodged in the sheriff.

The Superintendent of Police is the city officer in whom the power to make raids is lodged. The statutes make him a peace officer. (See Secs. 2 and 12 of Article VI, Cities and Villages Act; Sec. 2 of Division VI, Criminal Code.)

The ordinances of the city, among other duties imposed on him, require him to enforce all laws and ordinances as will be seen from the following:

“1914. The superintendent of police shall preserve the peace and secure good order and cleanliness within the City of Chicago, and to that end he shall enforce all laws and city ordinances, and the orders of the City Council and of the mayor of the City of Chicago.”

From the above it will be seen that to turn over the number of men to the state's attorney that is proposed will be in effect transferring a portion of the duties of the superintendent of police to the state's attorney.

In addition to the section of the code just quoted there are many other sections which are in conflict with the proposed ordinance. In fact it would be necessary to revise the chapter on police in order to make this new provision fit.

The city ordinances generally contemplate that there should be a number of departments and a head of each department. The head of the department is responsible for all employes under him, certifies to pay-rolls and has the management and control of all matters relating to the department.

The police department is no exception to this rule. There are a series of sections in Chapter LVI of The Chicago Code of 1911 describing the powers and duties of the superintendent of police, all of which would be affected by this ordinance. One of these sections reads as follows:

“1910. The superintendent of police shall be appointed by the mayor, with the advice and consent of the City Council. He shall, in accordance with the provisions of this ordinance, have the management and control of all matters relating to said Department of Police, its officers and members.”

It must be understood from the wording of the proposed ordinance that the superintendent of police will lose the management and control of some of the matters relating to this department, and will lose control of some of its officers and members. He will no longer be responsible for the conduct of these men, will not be able to certify on the pay-rolls as to the time they are employed or the nature of their employment, and in many other respects he will be cut off from supervision over them. The ordinance is necessarily in conflict with Section 1910, and it is likewise in conflict with other sections which we need not enlarge on, since the above illustrates the condition we refer to.

In this connection it should be noted that the ordinance not only cuts these men loose from the superintendent of police, but it cuts them loose from the City Council as well. In this respect it exceeds the power of the City Council, as fixed by Clause 71, Sec. 1, Art. V, of the Cities and Villages Act, which reads as follows:

“To provide by ordinance in regard to the relation between all the officers and employees of the corporation in respect to each other, the corporation and the people.”

No power exists by which the Council can control the relation between police officers of the city and a county officer.

This complex situation and division of authority brings us to the question of the status and rights of the officers so assigned under the civil service. We find that the situation becomes even more complex when this is considered.

The Civil Service Commission has no right to approve a payroll of the officers assigned to duty in a county office on the certification of the county officer. It can only approve on the certification of the head of a department of the city government. If the head of the department is not in a position to certify to the payroll a serious problem is presented. There might be some way of overcoming this if the ordinance were otherwise valid, but the matter calls for serious consideration.

Again, the question of who should prefer charges in a proper case if the officer is not under the control of the head of the department is a matter difficult of solution. It may be said that the state's attorney would get rid of an inefficient or dishonest man by sending him back to the chief of police, but even if that were done the chief would not be able to prosecute for the obvious reason that he would not be at liberty under the terms of this ordinance to subject the officer to discipline for acts done under the state's attorney.

The question of transfer under the statute and rules of the Civil Service Commission is another difficult matter. The ordinance does not take into account that the Civil Service Commission would have control of the transfer of any man in the classified service. It would permit the state's attorney to name the men he wants and take them regardless of the attitude of the commission. This is another point that may be overcome, but not without the sanction of the commission.

Finally, the question of whether the police officer assigned to a county officer will be in a position to claim his promo-

tional, pension, and general civil service rights if separated from all city departments, is another matter that should not be lost sight of. We doubt very much whether the courts would uphold the claims of such an officer if he were deprived of his position. A complete answer to such a claim would be a showing that he was not in fact in the classified service of the city while employed elsewhere.

However, over and above all other matters which we have set forth, there looms the main question of whether the City Council has it in its power to appropriate money for the payment of salaries of men employed in a county office. A general assignment to act under the direction of the state's attorney without limit as to time and without responsibility to a city officer means an employment in a county office.

"The state's attorney is a county officer, and his status as such, is fixed by the Constitution, which creates his office. He is elected for and within a county to perform his duties therein, and is not distinguished in any manner from the clerks of the courts, the sheriff, coroner and other officers, connected with the administration of justice within the county."

Cook Co. v. Healy, 222 Ill. 310-316.

There is no doubt whatever of the right of the superintendent of police to assign police officers to special duty under the direction of the state's attorney. Such assignment would be within the discretion of the superintendent of police without any ordinance giving him express authority to do so.

But while such special assignment for a limited time, or even for an indefinite time or until further orders, is a lawful assignment if the officer is delegated to do police duty, we doubt whether even the superintendent of police, who has full control over the members of the Department of Police, has the right to assign an officer to general, unlimited, and unrestricted duty under the state's attorney. As already pointed out, this amounts to transferring him from an employment under the city to an employment under the county.

The City Council has the right "to appropriate money for corporate purposes only, and provide for payment of

debts and expenses of the corporation.” (Clause 2, Sec. 1, Art. V, Cities and Villages Act.) This means that “municipal funds may be appropriated to any public purpose within the scope of its charter power.” (28 Cyc., 1534.) Is it within the charter powers of the city to furnish and pay salaries of employes of county officers?

It may be said that the raids on disorderly houses are a proper municipal activity and that the men doing this work are performing police duty for the city whether they act under the direction of a city or county officer.

The only difficulty with this proposition is that the very same kind of activity is also a proper county activity, and the law contemplates that when a county officer conducts it he should draw on the peace officers of the county. He can use city officers who were specially detailed for this express purpose but he cannot be given the power to demand city employes to work for him generally, without specific assignment, and without any control on the part of the city.

The City Council has no power to make an appropriation for persons to be employed by the state’s attorney for the purpose of performing police duty. The performance of police work or duty under the orders and direction of the state’s attorney is not a corporate purpose within the meaning of the statutes. Therefore, it would necessarily follow that neither the City Council nor any city officer could charge the City of Chicago with the expense incident to the employment of a number of policemen by the state’s attorney.

Where the power to do a thing by direct means is lacking, the doing of the same thing by an indirect method is also beyond the power of the officer. Hence, in the absence of power to appropriate money for the employment of police officers by the state’s attorney, neither the City Council nor any city officer has the right to accomplish this indirectly by assigning or detailing police officers, generally and without specific directions, for an indefinite time and without restriction or limit as to duty, to the office of the state’s attorney.

For the reasons set forth above we have come to the conclusion that such an ordinance as proposed would not be valid.

Yours truly,

HARVEY C. FOSTER,

JAMES W. BREEN,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Duties of City Officers Under Illinois Prohibition Act.

December 6, 1921.

HON. WILLIAM HALE THOMPSON, Mayor.

Dear Sir:

We beg leave to acknowledge receipt of your request for an opinion as to the duties imposed upon municipal officials under the terms and provisions of the Illinois Prohibition Act approved June 27, 1921, in force and effect July 1, 1921.

In reply, we beg to advise you that under the terms and provisions of the said act the word "liquor" or the phrase "intoxicating liquor" is construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt or fermented liquor, liquids and compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing one-half of one per centum or more of alcohol by volume, which are fit for use for beverage purposes. Section 3 provides that:

"No person shall on or after the date when this act goes into effect, manufacture, sell, barter, transport, deliver, furnish or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

Said section further provides that:

"Liquor for non-beverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, delivered, furnished and pos-

sessed, but only as herein provided, and the attorney-general may, upon application, issue permits therefor but in case the office of commissioner of prohibition shall be created, then such commissioner shall issue said permits; *Provided*, that nothing in this act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in government bonded warehouses."

Section 7 of the said act provides, in part, that:

"No permit shall be issued to anyone to sell liquor at retail, unless the sale is to be made through a registered pharmacist, local registered pharmacist, or registered assistant pharmacist designated in the permit and duly licensed under the laws of this state to compound and dispense medicine prescribed by a duly licensed physician."

Section 8 of said act provides that no one except a physician holding a permit shall prescribe liquor, and that such permit shall be granted by the attorney-general, unless the office of commissioner of prohibition shall be created, then such commissioner shall grant said permit. This section also provides that it shall be unlawful to prescribe wine, beer or any alcoholic malt liquor, and that no physician shall prescribe any liquor until after careful physical examination of the person for whose use such prescription is sought, and that then only a total quantity of one pint of intoxicating liquor shall be prescribed for use by the same person within any period of ten days, and no prescription shall be filled more than once, and no person shall procure or accept or have filled any prescription for more than one pint of liquor within said period of ten days. Any registered pharmacist, local registered pharmacist, or registered assistant pharmacist, filling a prescription for liquor, shall at the time endorse upon it over his own signature the word "canceled," together with the date when the liquor was delivered, and then make the same a part of the record that he is required to keep as provided in said act.

Sections 18, 19, 21 and 21a of said act provide as follows:

"§18. It shall be unlawful to advertise, manufacture, sell or possess for sale any utensil, contrivance, ma-

chine, preparation, compound, designed, or intended for use in the unlawful manufacture of intoxicating liquor.

“§19. No person shall solicit or receive, nor knowingly permit his employes to solicit or receive, from any person any order for liquor or give any information on how liquor may be obtained in violation of this act.”

“§21. Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this act, or where any mash, still or other property designed for the illegal manufacture of liquor is kept, and all intoxicating liquor, mash, still or other property kept and used in maintaining the same, is hereby declared to be a common nuisance; a single unlawful sale or barter, or a single act of manufacturing liquor unlawfully shall constitute a nuisance as herein defined. And any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$500 or be imprisoned not more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provisions of this act, and suffers the same to be occupied or used, such room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation and any such lien may be enforced by action in any court having jurisdiction.

“§21 (a). No lien, as provided in Section 21 shall take effect until action to enforce it is commenced in the county within which the property is located, unless when prosecution shall be commenced against any occupant of any premises under this section, there shall be filed in the office of the recorder of deeds of such county, an affidavit setting forth that such suit has been instituted, giving the name of the defendant, the name of the owner of the property, and a description of said property, such description to be the legal description in case of real estate. *Provided, further,* however, that if the property in question shall be real estate, the title to which is registered in the office of the registrar of titles under the provisions of an act entitled, ‘An Act concerning Land Titles,’ approved and in force May 1, 1897, as subsequently amended, then such affidavit shall be filed in the office of the registrar of titles of the county in which the

real estate is situated, instead of the office of the recorder of deeds. If such an affidavit shall be filed, and it shall subsequently be determined by a court of competent jurisdiction that such a lien exists, the lien shall relate back to the date of such filing, but unless action to enforce such lien shall be commenced within six months after the filing of such affidavit, the filing shall be deemed of no effect whatever."

Section 22 provides that any action to enjoin any nuisance defined in said act may be brought in the name of the State of Illinois by the attorney general of the state or by any state's attorney, city attorney or prosecuting attorney of any city, or by any citizen of the county where a nuisance as therein defined exists.

Section 31 provides, in part, as follows:

"When any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law, with or without a warrant. Whenever intoxicating liquors transported or possessed illegally, shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this act in any court having competent jurisdiction, but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by the court having jurisdiction of the case and shall be conditioned to return said property to the custody of said officer on the day of the trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed. Summons shall issue against the owner of such vehicle or conveyance and all persons holding liens against said property, if they can be found within the jurisdiction of the court; if not so found, service must be had by publication as provided in Section 46 of this act. * * *"

Section 33 provides as follows:

“(A) Any person who manufactures, transports, or sells liquor in violation of this act shall for a first offense be fined not less than \$100 nor more than \$1,000, or be imprisoned not less than sixty days nor more than six months or both and for a second or subsequent offense shall be fined not less than \$500 nor more than \$1,500 and be imprisoned in the state penitentiary not less than one year nor more than two years.

“(B) Any person violating the provisions of any permit, or who makes any false record or report required by this act or violates any of the provisions of this act, for which offense a special penalty is not prescribed, shall be fined for a first offense not less than \$100 nor more than \$1,000, or be imprisoned not less than sixty days, nor more than six months; for any subsequent offense he shall be punished by a fine of not less than \$500 nor more than \$1,500 and be imprisoned in the state penitentiary not less than one year nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information or indictment. The penalties provided in this act against the manufacture of liquor without a permit shall not apply to a person for manufacturing non-intoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar.”

Section 42 of the said act reads:

“It shall be the duty of all municipal, county, and state officials to cooperate in the enforcement of this act.

“If any sheriff, deputy sheriff, chief of police, marshal, policeman, constable or other peace officer shall have knowledge, information or suspicion of any violation of any provision of this act, he shall diligently investigate and secure evidence of the same and shall, before the proper officer, make and sign complaint against the offending person, anything in the ordinance or by-laws of any municipality to the contrary notwithstanding.”

Under the provisions of the Illinois Prohibition Act any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept or bartered in violation of this act, or where any mash, still or other property designed for the illegal manufacture of liquor is kept,

and all intoxicating liquor, mash, still or other property kept and used in maintaining the same, is declared a common nuisance, and a single unlawful sale or barter or a single act of manufacturing liquor unlawfully is deemed a nuisance as therein defined.

The act further provides that any person who maintains such a common nuisance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not more than \$500 or be imprisoned not more than one year, or both. Under the express provisions of the said act, if a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure or place is occupied or used for the manufacture or sale of liquor contrary to the provisions of said act, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction.

This act also provides that any action to enjoin any nuisance defined in said act may be brought in the name of the State of Illinois by the attorney general of the state, or by any state's attorney, city attorney or prosecuting attorney of any city, and that such action shall be brought and tried as an action in equity by the court, without a jury. The act also provides that if it is made to appear by affidavits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall issue restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. Complete equity jurisdiction is conferred upon all county courts concurrently with the circuit courts and the Superior Court of Cook County to hear and determine all injunction cases which may be brought under this act.

Under Section 42 of said act it is made the duty of all municipal, county and state officials to co-operate in the enforcement of this law, and it is expressly made the duty of

the sheriff and deputy sheriffs, the chief of police and all policemen, marshals, constables or other peace officers to enforce the provisions of the said act; to diligently investigate any and all charges that the said law is being violated; to secure evidence of the same, if possible; and to make and sign complaints against any and all persons who violate any of the terms and provisions of the said act.

From a careful analysis of the terms and provisions of the said Illinois Prohibition Act, we desire to advise you that it is unlawful:

First, for any one to sell, at retail, intoxicating liquor as defined in said act for beverage purposes, except a registered pharmacist, local registered pharmacist or registered assistant pharmacist duly licensed under the laws of the State of Illinois, and then only on a prescription issued by a duly licensed physician who has been granted a permit by the attorney general to prescribe liquor.

Second, for any person, firm or corporation to manufacture, sell, purchase, transport or prescribe any liquor for any purpose except manufacturing purposes, sacramental purposes, or medicinal purposes.

Third, for any person to purchase or sell, at wholesale, intoxicating liquor as defined in this act, except for sacramental purposes, without first having secured a permit from the attorney general of the State of Illinois authorizing the purchase or sale of the same.

Yours very truly,

JAMES W. BREEN,

Approved: *First Assistant Corporation Counsel.*

SAMUEL A. ETTELSON,

Corporation Counsel.

Liability of City for Negligence of Street Cleaner.

December 6, 1921.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

You request an opinion in regard to the liability of the city for damages under the following facts:

An employe of the street cleaning department, while engaged in his duty of street cleaning, heaped together some papers and rubbish in an alley and set fire to them. The fire was negligently lighted so close to a frame building, that the building caught fire and damage was occasioned. The owner of the building is now threatening to sue the city for these damages. It is our opinion that the city is not liable for the foregoing reasons:

The liability of a municipal corporation for the negligent act of its employe acting within the scope of his employment, depends upon whether the city was exercising, through such employe, a governmental or private function. There is no Illinois case which decides under which branch street cleaning falls. The question has been adjudicated in other states, and while the decisions are not altogether harmonious, the general trend of the decisions is to hold this a governmental function and therefore to hold the city not liable.

Hadley v. Boston, 191 Mass. 291.

Johnson v. Somerville, 195 Mass. 370.

Condict v. Jersey City, 46 N. J. L. 157.

Love v. Atlanta, 95 Ga. 129.

Kuehn v. Milwaukee, 92 Wis. 263.

Conelly v. Nashville, 100 Tenn. 262.

Savage v. Salem, 23 Ore. 381.

Kippes v. Louisville, 140 Ky. 423.

Cassidy v. St. Joseph, 152 S. W. 306.

Quoting from *McQuillan on Municipal Corporations* (Supp.), §2636, re Cleaning Streets and Dumping Grounds:

“In street cleaning and the establishment and maintenance of dumping grounds, while diversity of judicial views still prevails, late cases generally hold, with some exceptions, that such function is governmental, rather than proprietary, exercised by the municipality as an administrative agency of the state or for the public in the interest of the public health and general welfare, and hence, negligence relating thereto creates no municipal liability, unless in the exercise of such power a nuisance in fact is thereby created and maintained by the municipality.”

Reilly v. New Brunswick, 108 Atl. 107.

Savannah v. Jordan, 142 Ga. 409.

Bruhnke v. La Crosse, 155 Wis. 485.

Evans v. Sheboygan, 153 Wis. 287.

Moulton v. Fargo (N. D.), 167 N. W. 717.

Brunson v. Santa Monica, 27 Cal. App. 89.

It is further submitted that it is good law to consider the cleaning of streets the exercise of a governmental function by the city. For the city as such does not alone enjoy the benefits of clean streets. Anyone in the state may come into the city and use the streets, and so it is in the interest of all the people in the state that the streets be kept clean and free from refuse.

A further ground of exemption from liability might be urged, depending upon the facts. The substance of ordinance No. 2473 of The Chicago Code (1911), provides that no dirt, ashes, paper, charcoal, etc., shall be deposited in any manner whatsoever in any street, alley, etc., by any person unless removed therefrom within two hours. Therefore, if the city employe did not intend to remove the ashes left from the paper and rubbish he was burning, and did not in fact remove them, he was doing an act forbidden by ordinance and therefore was not acting as the agent of the city and the city cannot be bound by his negligence.

Perley v. Georgetown, 7 Gray (Mass.) 464.

Trescott v. Waterloo, 26 Fed. Rep. 592.

Lorillard v. Monroe, 11 N. Y. 392.

Tyler v. Revere, 183 Mass. 98.

Chicago v. Hannon, 115 Ill. App. 183.

Respectfully submitted,

ALBERT HENRY VEEDER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**City Automobile License Not Required for Vehicles of
Federal Government.**

December 8, 1921.

HON. ARTHUR E. GORMAN, District Engineer, U. S. Treasury
Department.

Dear Sir:

Replying to your communication of the 5th instant, addressed to the city attorney, and inquiring whether the city ordinances or state laws relative to licensing automobiles, apply to automobiles owned by the United States Government and driven by federal employes, permit us to say:

That a state, or a subdivision thereof, can not levy a tax on the federal government or its agencies, was settled early in the history of our country.

McCulloch v. Maryland, 4 Wheat. 316.

Osborn v. U. S. Bank, 9 Wheat. 738.

Slaughter House Cases, 16 Wall. 36.

A license fee, however, is not generally regarded as a tax, but merely as a charge for services rendered, and when imposed as an inspection fee, in the exercise of the police power of the state, it has often been held valid, even though it affects to a certain extent, matters that are under the jurisdiction of the federal government. Thus it has been held that, in the absence of national legislation covering the subject, a state may impose a license fee on automobiles used in interstate commerce.

In *Hendrick v. Maryland*, 235 U. S. 610, the Supreme Court of the United States said:

“In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulation necessary for public safety and order in respect to the operation upon its highways of all motor vehicles,—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horsepower of the engines,—a practical measure of size, speed and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the

states and essential to the preservation of the health, safety and comfort of their citizens; and does not constitute a direct and material burden on interstate commerce.’’

Whether the rule last above stated would apply also to automobiles owned by the United States Government itself, was long considered a disputed question. It is only within the last year that the Supreme Court of the United States has finally settled the question (and then only by a divided court) in the case of *Johnson v. Maryland*, 254 U. S. 51, where the majority of the court were of the opinion that the drivers of such automobiles are not subject to state license fees. The court, speaking through Mr. Justice Holmes, said:

“The plaintiff in error was an employe of the Post Office Department of the United States and while driving a government motor truck in the transportation of mail over a post road from Mt. Airy, Maryland, to Washington, was arrested in Maryland, and was tried, convicted and fined for so driving without having obtained a license from the state. * * *

“Of course an employe of the United States does not secure a general immunity from state law while acting in the course of his employment. That was decided long ago by Mr. Justice Washington in *United States v. Hart*, Pet. C. C. 300, 5 Ops., Atty. Gen. 554. It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at corners of streets. *Commonwealth v. Slosson*, 229 Mass. 329. * * *

“It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the government has pronounced sufficient. It is the duty of the

department to employ persons competent for their work and that duty it must be presumed has been performed.”

Johnson v. Maryland, 254 U. S. 51.

For the reasons above stated, we are of the opinion that you are not required to obtain any state or city license to operate the automobile mentioned in your letter.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Interpretation of Section of Police Pension Fund Statute Defining Policemen.

December 15, 1921.

TO THE RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY
AND BENEFIT FUND, Chicago, Illinois.

Gentlemen:

We are in receipt of your communication of recent date requesting us for an interpretation of the definition of the word “policeman” as defined in an act entitled, “An Act to provide for the creation, setting apart, maintenance and administration of a policemen’s annuity and benefit fund in cities having a population exceeding 200,000 inhabitants,” approved June 29, 1921, in force July 1, 1921, and asking us to advise you what members of the police force are included in the phrase “and member of the police force of such Police Department,” which appears in Section 12 of said act, and further requesting us to advise you whether the Greek investigator and police surgeons are included as participants in said fund.

In reply, we beg leave to advise you that, upon investigation, it appears that the Legislature of the State of Illinois passed two separate and distinct statutes construing the word “policeman” and defining how it shall be interpreted and what it shall be construed to mean. Both laws were

passed on the same day and both were approved on June 29, 1921, and took effect on July 1, 1921.

Section 12 of the act entitled, "An Act to provide for the creation, setting apart, maintenance and administration of a policemen's annuity and benefit fund in cities having a population exceeding two hundred thousand inhabitants" appears on page 270 of the Law of Illinois of 1921, and, in part, reads as follows:

"The following words and terms as used in this act shall mean as follows, respectively:

"'Policeman': Any person appointed and sworn or designated by law as a policeman of such city, and who has served, or is serving, or shall serve in regularly constituted police department of such city as a policeman, or policewoman, or police patrol driver, or police operator, or secretary of such police department, or police dog catcher, or police kennelman, or police matron, and member of the police force of such police department."

The act entitled, "An Act entitled, 'An Act to further amend an act entitled, 'An Act to provide for the setting apart, formation and disbursement of a police pension fund in cities having a population exceeding two hundred thousand inhabitants,' approved June 29, 1915, in force July 1, 1915,' approved June 29, 1921, and in force July 1, 1921, will be found on pages 313 and 314 of the Laws of Illinois of 1921, and reads as follows:

"SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That Section 7 of the act entitled, 'An Act to provide for the setting apart, formation and disbursement of a police pension fund in cities having a population exceeding two hundred thousand inhabitants,' approved June 29, 1915, in force July 1, 1915, as amended, be and the same is hereby further amended so that the said section shall read as follows:

"§7. Whenever the word 'policeman,' as used in this act, appears, the same shall be interpreted and construed to mean and to include the following:

"'Any person who has been appointed and sworn or designated by law as a policeman, and has served in a regularly constituted police department as a policeman, or police patrol driver or police operator, police dog

catcher or police kennelman or special investigator or police hostler and a member of the police force thereof, and contributed to the police pension fund for such time as he has been in the service of such police department as a policeman, or police patrol driver or police operator or police dog catcher or police kennelman or police hostler; the intention being that all policemen or police patrol drivers or police operators, police dog catchers or police kennelmen, special investigators or police hostlers who have so contributed to the police pension fund (their widows and children entitled thereto), shall be entitled to any of the benefits of any pension law in force and effect when this act, in cities within its terms, shall supercede an act entitled, 'An Act to provide for the setting apart, formation and disbursement of a police pension fund in cities, villages and incorporated towns,' approved April 29, 1887, in force July 1, 1887, as subsequently amended.

"Whenever any person holding any one of the positions above enumerated, in the service of any city covered by this act, shall, prior to the passage hereof, have contributed toward the support and maintenance of any pension fund of said city, created by an act or acts of the General Assembly of the State of Illinois, such person, or the purpose of eligibility for pension under this act, shall be credited, by the board of trustees of the police pension fund of said city, with the number of years during which such payments have been made; and the governing body and executive officers of the fund to which such person has contributed shall forthwith pay to the police pension fund sums paid to it by said person, to be held and disbursed by said police pension fund, in accordance with the provisions of this act."

We are thus confronted by two separate and distinct laws, each placing a different construction upon the word "policeman." In order, therefore, to determine who are policemen and entitled to participate as such in the policemen's annuity and benefit fund, it is necessary for us to ascertain whether the passage of one of the above laws operated as a repeal of the other, or whether, under the law, both laws remain in force and effect.

In the case of *Commonwealth v. Huntley*, 156 Mass., page 236, the Supreme Court of Massachusetts, in discussing a case

involving a question similar to the one with which we are confronted, said:

“Statutes passed on the same day and which take effect at the same time will all be assumed to have been enacted at the same time and are to be construed as one act. Such construction shall be given, if possible, as shall leave all to stand. If this can not be done only so much is to be disregarded as cannot stand. * * * When statutes are passed at the same session to take effect the same day there is strong evidence that they were intended to stand together.”

In discussing the rule governing the construction of statutes, the Supreme Court of Illinois, in *Stribling v. Prettyman*, 57 Ill., page 371, at page 375, said:

“In the construction of statutes, the intention of the Legislature is always a proper subject of inquiry. The intention is to be ascertained from the act itself, and other acts *in pari materia*. LORD MANSFIELD said: ‘All acts *in pari materia* are to be taken together as if they were one law.’ This rule prevails, even though some of them may have expired or been repealed.”

Both of the acts construing and defining the word “policemen” were passed by the same Legislature, related to the same subject, and cannot be said to be repugnant or inconsistent with each other. Being contemporaneous and *in pari materia*, under a well settled rule of law governing the construction of statutes in this state, they must be construed together as if they were one statute.

Hunt v. The Horse & Dummy Ry. Co., 121 Ill. 638.

Union National Bank v. Byram, 131 Ill. 92.

Lake Shore & Mich. Sou. Ry. Co. v. Chicago, 148 Ill. 509.

South Park Commrs. v. The First National Bk., 177 Ill. 234.

26 Am. & Eng. Ency. of Law, 623.

We are, therefore, of the opinion that, for the purpose of determining who are the participants in the Policemen’s Annuity & Benefit Fund, you are to construe the word “policeman” to mean and include any person appointed and sworn or designated by law as a policeman of the City of Chicago

and who has served, or is serving, or shall serve in the regularly constituted Police Department of this city as a policeman or policewoman, or police patrol driver, or police operator, or secretary of such Police Department, or police dog catcher, or police kennelman, or police matron, or special investigator or police hostler. In determining the question of the amount of time of service to be counted for pension purposes for any person holding any of the positions mentioned above, it is your duty to credit such person with the number of years during which payments have been made toward the support and maintenance of any pension fund of the City of Chicago created by any act or acts of the General Assembly of the State of Illinois, and it is your duty to forthwith demand, from the governing body or executive officers of any pension fund to which such person has contributed, the entire amount paid by such person to said pension fund, and to place the same to the credit of such person in the Policemen's Annuity & Benefit Fund.

It is also our opinion that under the interpretation of the word "policeman" it is your duty to credit police patrol drivers, police operators, secretary of the Police Department, police dog catchers, police kennelmen, police matrons, special police investigators and police hostlers with the number of years that they have served in such capacities in the Department of Police.

Yours truly,

JAMES W. BREEN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Billiard Room Licenses.

December 30, 1921.

HON. AGE ZYLSTRA, City Collector.

Dear Sir:

In response to your request for an opinion as to your authority to refuse to issue a billiard room license for the

year 1922 to a party who operated a billiard room during the year 1921 without having obtained a license therefore, we advise you as follows:

Section 3 of the ordinance creating a billiard commission provides that no person, society, club or corporation shall open, conduct, maintain or operate a billiard room within the City of Chicago unless such person, society, club, firm or corporation shall have first been duly licensed by the City of Chicago.

Section 20 of the same ordinance provides a penalty of not less than \$10 nor more than \$200 for the operation of a billiard room without a license.

Our Supreme Court has said in the case of *Israel v. Town of Jacksonville*, 2 Ill. 290, "that debt is the proper form of action to collect the penalty for the violation of a municipal ordinance."

Section 1518 of The Chicago Code of 1911 reads as follows:

"1518. NO LICENSE OR PERMIT TO ANY PERSON INDEBTED TO CITY.) Hereafter no license or permit shall be issued to any person, firm or corporation unless and until such person, firm or corporation discharges and pays to the City of Chicago all indebtedness then due from such person, firm or corporation."

It is therefore our opinion that you not only have the authority, but that it is clearly your duty, to refuse to issue a license for a billiard room for the year 1922 to any one who has operated a billiard room in 1921 without having paid the license fee therefore.

Yours very respectfully,

FRANK W. DERBY,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Claim of C. R. I. & P. Ry. Co., for Excavating Under the 79th Street Subway.

January 6, 1922.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

We are in receipt of your favor of the 29th ultimo, requesting an opinion from the corporation counsel relative to the city's liability in the above matter; also enclosing Council papers relative to the case, including a proposed order that the city pay the above claim, and that the corporation counsel take the necessary action to collect the amount thereof from the Chicago Surface Lines.

For the reasons hereinafter stated, we are of the opinion that the above claim should not be allowed.

The excavation in question was provided for by the Track Elevation Ordinance of July 13, 1908, which required the Chicago, Rock Island & Pacific Railway Company, the Chicago & Western Indiana Railroad Company and certain other railroads, to elevate their tracks, and to construct subways at certain streets, etc., and which ordinance, we understand, was thereafter formally accepted by all of said railroad companies.

Section 4, paragraph 6, of this ordinance provided as follows (C. P. 1195):

"Subways shall be constructed beneath the tracks of the Chicago, Rock Island & Pacific Railway Company where said tracks are intersected and crossed by West Seventy-eighth street, *West Seventy-ninth street*, West Eightieth street, West Eighty-first street, West Eighty-third street, South Halsted street, Vincennes road, West Eighty-seventh street, West Eighty-eighth street, West Eighty-ninth street, and a foot passageway shall be constructed beneath the tracks at West Eighty-fifth street."

Section 4, paragraph 10, read, in part, as follows (C. P. 1195):

"The Chicago & Western Indiana Railroad Company shall construct all that portion of the subway in West Seventy-ninth street and the east approach thereto lying east of its west right of way line; and the Chicago, Rock Island & Pacific Railway Company shall construct the

remaining portion and the west approach of said subway.”

Section 4a of the ordinance reads, in part, as follows (C. P. 1196):

“The several subways hereinbefore referred to in Section 4 of this ordinance shall be constructed below the elevation upon which such tracks are to be placed and shall, as to their size and dimensions, location and other details, be in accordance with the following schedule:

Then follows a detailed description of the depression of the roadbed, the sidewalks, grade and other details of each subway contemplated, including a roadbed 46 feet wide and a sidewalk 10 feet wide on either side thereof.

The ordinance further provided in Section 5, paragraph 1 (C. P. 1224):

“All such work shall be done by the respective railway and railroad companies as indicated in Section 4a, and *at their sole expense* and under immediate supervision and to the entire satisfaction of the commissioner of public works of the City of Chicago.

“Provided, however, if in the construction of any of said subways and approaches it may become necessary to disturb, remove or destroy any pipes, conduits, wires or *other property* belonging to any private corporation or individual, said railway and railroad company, or companies, shall not be required to assume any of the expense thereof or damage thereto, and the City of Chicago will secure to said railway or railroad company, or companies, the free and uninterrupted right to prosecute its or their said work and will save the said railway and railroad company, or companies, harmless from any and all claims, demands and suits arising therefrom and all damages which may be recovered from such suits.”

Section 8, paragraph 4, of the ordinance reads as follows (C. P. 1227):

“Any street railway company or companies occupying any of the streets in the City of Chicago crossed by said proposed elevated roadbeds and tracks of any of said companies shall, when and as the grade of such street shall be changed as in this ordinance provided, at its own expense, without claim for damages, conform the grade

of its track or tracks to the said change of grade of said streets, and nothing in this ordinance shall operate or be held to relieve such street railway companies from *any liability now existing, however created, to excavate or pave or bear the expense of excavating or paving the subways or approaches between or on the outside of the rails of its said tracks*; and further this provision shall be construed as including the excavation and paving of all the area within the inside rails of said street railway tracks in said subways and on said approaches developed by reason of the spread of said street railway tracks in said subways to provide proper and safe clearance from the posts or columns supporting the bridges carrying the elevated roadbeds and tracks of said railway and railroad companies; said paving within said inside rails shall be in all respects as good as, or conform with the specifications hereinbefore drawn in Section 8, paragraph 1, of this ordinance."

Section 15 of the ordinance of 1907, granting a franchise to the Chicago Railways Company, read as follows:

"The Company shall at its own expense, fill, grade, pave and keep in repair that portion of the streets occupied by it, as more specifically provided for in said 'Exhibit B'."

And said "Exhibit B" provided:

"The tracks to be maintained by the Company shall not be elevated above the surface of the street or public way in which they are placed. They shall be laid and maintained by the Company so as to conform to the grade of such street or public way as the same is, or from time to time hereafter shall be, established by the City Council."

As we understand the language of the ordinance of July 13, 1908, it provided:

1. That the Rock Island Company and the Chicago & Western Indiana Railroad Company should construct "*all*" of the subway in question, except that they were not required to move the wires, tracks, or any other *property* of the street car company.

2. That the city specifically *refused to waive* any right it had, under the ordinance of 1907, to compel the street car company to excavate that portion of the subway located under its tracks.

3. But that the city *made no promise to the railroad companies* that it would force the street car company to excavate under its tracks, and did not release the railroad companies from making this excavation in case the street car company should, for any reason, fail to do so.

It will be noted that the ordinance makes a distinction between the liability to relay the street car tracks and the liability to excavate under the same. As to the former, it provides that the railroad companies:

“shall not be required to assume any of the expense thereof.”

But as to the latter, it merely provides that the ordinance shall not be held

“to *relieve* such street railway companies from any liability now existing.”

In other words, the former duty was not *required* of the railroad companies; the latter they *might* not be required to do, provided the street car company did it first—a duty which the city claimed the right to demand of the street car company, but which it did not *guarantee* that it would compel that company to do.

While the ordinance of 1907, granting the franchise to the street car company, obligated that company to grade the portions of the streets used by its tracks whenever the city should so desire, yet this did not prevent the city from contracting with other parties to do the grading if it saw fit, and the ordinance of July 13, 1908, as we understand it, obligated the railroad companies to grade the subway here in question, but with the proviso that the city might relieve them of this duty by compelling the street car company to perform it.

As might naturally have been expected, this provision of the ordinance resulted in a discussion between the parties concerned, as to whether the railroad companies or the street car company should perform and pay for the excavation of that part of the street located under and between the street car tracks. This discussion having occasioned considerable delay, the City Council, in order to avoid further delay, passed the following order:

“ORDERED, That the Commissioner of Public Works be and he is hereby authorized, in accordance with his request of November 13, 1914, hereto attached, to direct the railroad companies to do whatever work was required of them under the terms of the track elevation ordinance, passed July 13, 1908, covering the elevation of the tracks of the Rock Island Lines and the Western Indiana at 79th street, and bill the city for the expense therefor, the bill to be given to the corporation counsel for action to make the responsible party pay.”

Council Proceedings of Nov. 18, 1914, page 2054.

By his order the City Council did not, in our opinion, intend to alter or release any liabilities created by the ordinance of July 13, 1908. The purpose of the order, as we understand it, was merely to provide that the railroad companies might proceed with the work of excavating under the street car company's tracks, without admitting any legal liabilities to do so, and if the city should afterwards find that the street car company was liable for the amount, and that said amount was readily collectible, the city would collect the amount from said company and reimburse the railroad companies, but if the city should not succeed in collecting said amount from the street car company and the city should further find that the railroad companies were also liable for the amount, the latter companies would have to stand the expense.

On the other hand, if the City Council meant by this order to alter the ordinance of July 13, 1908, then it was illegal and void. For the law is well settled that City Council cannot repeal or modify a formal ordinance by a mere order or resolution.

Hibbard v. Chicago, 172 Ill. 91.

C. & N. P. R. Co. v. Chicago, 174 Ill. 439.

People v. Latham, 203 Ill. 9.

Backhaus v. People, 87 Ill. App. 173.

City of Joliet v. Petty, 96 Ill. App. 450.

The commissioner of public works, however, evidently misapprehending the legal effect of the above order as well as that of the ordinance above mentioned, wrote, a few days later, to the engineer in charge of the track elevation for the Rock Island Railway Company, as follows:

“November 25, 1914.

“Mr. R. H. Ford,
Engineer, Track Elevation,
Rock Island Lines, Chicago.

Dear Sir:

“Confirming verbal order given by this department, please proceed with the work of excavating the right of way of Chicago Surface Lines in the subway under the right of way of the Rock Island Lines at 79th street, and bill the cost for the work to the Bureau of Streets. The City of Chicago will pay this bill and will collect the amount thereof from the Chicago Surface Lines.

Very truly yours,

L. E. MCGANN,

Commissioner of Public Works.

“Recommended by
P. McCarthy,
Asst. Superintendent of Streets.”

We find nothing, either in the ordinance of July 13, 1908, or in the council order of November 18, 1914, authorizing such a letter. The City Council had at no time promised either that the city would pay the bill or that it would make the Chicago Surface Lines pay it. And, of course, the commissioner of public works had no authority to modify an ordinance or contract made by the City Council. In our opinion, therefore, the commissioner of public works, in writing the above letter, clearly exceeded his authority, and his action is not binding upon the city.

We should be loath to take this position, if we were dealing with a party inexperienced or uninformed as to the law, but the Rock Island Railroad Company—itsself a large corporation with abundant experience as to the necessity of ascertaining the limit of authority of administrative officers, and accustomed to be guided in all important matters by the advice of able counsel—will hardly plead ignorance of the elementary proposition of law here involved. That they never actually regarded the above letter as binding upon the city is also evidenced by the fact that they merely say, concerning it:

“Mr. McGann *personally* authorized this company to proceed with this excavation and gave assurance that prompt payment would be made by the city.”

When the company accepted Commissioner McGann's proposition, it did so with full knowledge that he had no authority to modify the ordinance of July 13, 1908, and that no unauthorized, inadvertent statement by him would relieve the company from any duties or liabilities imposed upon it by said ordinance.

It will be observed that the order of November 18, 1914, was very carefully drawn. The City Council admitted nothing, and promised nothing, except merely that the railroad companies might do the excavating "without prejudice" to their right of disclaiming legal liability to do it. The most that the city could be said to have promised inferentially (and even that does not appear very clearly from the order) was that the city would make a *reasonable effort* to collect from the street car company the cost of the excavation under and between its tracks, and that, if it succeeded in collecting such amount, it would reimburse the railroad companies to that extent.

Our conclusion is, therefore, that the Rock Island Company was, by the ordinance of July 13, 1908, bound to make the excavations here in question, at its own expense, subject only to the right of reimbursement in case the city should, after reasonable effort, succeed in collecting the amount from the street car company; that the city, although it has made reasonable efforts, has not as yet succeeded in collecting said amount, or any part thereof, from the street car company; that the city, therefore, owes nothing to the Rock Island Company and that this claim ought not, therefore, to be allowed.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,
Acting Corporation Counsel.

Powers of Athletic Commission.

January 7, 1922.

HON. OSCAR H. OLSEN, Chairman Athletic Commission.

Dear Sir:

In response to your inquiry as to whether the powers of the Athletic Commission, which now has jurisdiction over wrestling only, could be increased so as to give the said commission jurisdiction over bowling matches, billiard matches and bicycle races, we advise you that at the last session of the General Assembly the 41st clause of the Cities and Villages Act was amended by adding an additional paragraph, which reads as follows:

“To license, tax and regulate baseball exhibitions, wrestling matches, walking matches, automobile races, bicycle races and all other athletic contests and exhibitions carried on for gain, such tax to be fixed or based on the gross receipts derived from the sale of admission tickets to such exhibitions, matches, races or other athletic contests, said tax, however, not to exceed three per cent of such gross receipts.”

Bicycle races are specifically mentioned in the said amendment and bowling matches are in our opinion, an athletic contest, and therefore we believe that the city has the power to license both of these on a basis of a percentage of the gross receipts. Billiard matches are not in our opinion athletic contests, and therefore would not come under the classification of *all other athletic contests and exhibitions*. We believe the word “athletic” was intended to modify the word “exhibitions” and therefore the city has no power to license said billiard matches on a percentage of the gross receipts.

“Statutes granting powers to municipal corporations are to be strictly construed, and any fair and reasonable doubt as to the existence of such powers is resolved against the municipal corporations exercising them.”

City of Chicago v. M. & M. Hotel Company, 248 Ill. 264.

At the present time billiards, pool and bowling matches are classified as a 12th class amusement, the license fee for said class being as follows:

“12th Class. If it is intended to produce, conduct, offer or present entertainments only of the 12th class and the highest price of admission charged thereto shall exceed seventy-five cents, the license fee shall be twenty-five dollars per day; if the highest price of admission exceeds fifty cents, but does not exceed seventy-five cents, fifteen dollars per day; if the highest price of admission exceeds ten cents, but does not exceed fifty cents, ten dollars per day; and if the highest price of admission does not exceed ten cents, one dollar per day.”

If it is your desire to have any or all of the exhibitions which are mentioned in the 41st clause of the Cities and Villages Act added to the Athletic Commission ordinance, if you will so advise us we will be pleased to prepare the necessary amendments to said ordinance.

We can see no reason why billiard matches could not be placed under the jurisdiction of the Billiard Commission, and if you so desire and will advise us we shall be pleased to prepare the necessary amendment to this ordinance.

Yours respectfully,

FRANK W. DERBY,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Proxy of Member of Zoning Commission Not Able to Vote.

January 9, 1922.

HON. CHARLES BOSTROM, Chairman of the Zoning Commission.

Dear Sir:

We are in receipt of a letter from the executive secretary in which he inquires whether a member of the Zoning Commission has a right to appoint a proxy in his stead, and whether such proxy can vote for the member at the meetings of the commission. Appended to such letter is a letter addressed to you, signed by Alderman Cermak, in which he seeks to substitute Alderman Kostner in his place on the Zoning Commission. Another question is asked concerning

the necessity of appointment for each meeting, but that is disposed of by the fact that such delegation of authority is not permissible under the law.

The rule is absolute that, unless there is express or implied authority given by statute or ordinance for the substitution of another in his place, an officer charged with duties that call for judgment and discretion on his part cannot delegate his authority to another. It is otherwise in the case of an officer who is charged with purely ministerial duties.

No authority to appoint a proxy or to delegate powers on the part of a member of the commission is expressed or implied in either the statutes or ordinances.

The following excerpt taken from Mechem on Public Officers (§567) sets forth the reason for this rule:

“It is a well settled rule, in the case of private agents, that where the execution of the trust requires, upon the part of the agent, the exercise of judgment or discretion, its performance can not, in the absence of express or implied authority, be delegated to another. In such cases it is presumed that the agent was selected because his principal desired and relied upon the agent’s personal judgment and discretion, and, unless authority to delegate it be expressly or impliedly given, the agent can not entrust the performance to another to whom the principal may be, perhaps, a stranger, and in whom he might not be willing to confide.

“This rule applies also to public officers. In those cases in which the proper execution of the office requires, on the part of the officer, the exercise of judgment or discretion, the presumption is that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and, unless power to substitute another in his place has been given to him, he can not delegate his duties to another.

“The applicability of the principle would be obvious in the case of judges of courts, who clearly could not be permitted to delegate or farm out their judicial duties to others, but it applies as well to all cases in which judicial and discretionary power is to be exercised. Thus the power to fix and to admit to bail is a judicial one which can not be delegated.

“It is also frequently invoked in the case of municipal boards and officers. Wherever these boards and officers are vested with discretion and judgment, to be

exercised in behalf of the public, the board or officer must exercise it in person and can not, unless expressly or impliedly authorized to do so, delegate it to others.”

The same rule is laid down in Dillon on Municipal Corporations (Sec. 244) and other text writers and authorities could be cited, but it is unnecessary in view of the pointed statement quoted above.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Right to Require Subdividers to Institute Proceedings for Water and Sewers.

January 10, 1922.

COMMITTEE ON JUDICIARY, City of Chicago.

Gentlemen:

I have received your communication of November 21, 1921, requesting an opinion as to the legality of an ordinance providing that subdividers of land to be sold for dwelling purposes shall have proceedings instituted for water and sewers at the time of the filing of the plat of the subdivision, and, in reference thereto, the following is submitted:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable.

Cook County v. McCrea, 93 Ill. 236.

Ottawa v. Carey, 108 U. S. 110.

Kelly v. Town of Milan, 21 Fed. Rep. 714.

Dillon on Mun. Corporations, 5th Ed. Vol. 1, Sec. 237.

Can the proposed ordinance be construed as coming within the third class of powers as stated above? There is reasonable doubt that it does, and any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

Hanger v. Des Moines, 52 Ia. 193.

Kirkham v. Russell, 76 Va. 956.

Merril v. Monticello, 138 U. S. 673.

Los Angeles City Water Co. v. Los Angeles, 88 Fed. Rep. 720.

It is a well settled rule that of every municipal corporation the charter or statute by which it is created is its organic act; and all acts beyond the scope of the powers granted are void.

People v. Weber, 89 Ill. 347.

Butler v. Nevin, 88 Ill. 575.

That the proposed ordinance is not within the scope of the police power of a municipality might be questioned under ordinary circumstances on the ground that it is not certain whether or not the regulation constitutes a municipal affair or business. But whatever doubt there might exist on the subject matter is fully removed by reason of the fact that the Legislature has legislated on the same subject which, in effect, deprives the City Council of any further power on the same matter.

Chapter 109, Hurd's R. S., as amended in 1921 (Session Laws, page 677).

Almost all of the sections in the aforesaid chapter on plats pertain to the requirements of the proper execution of plats of subdivisions and do not, with few exceptions, give the city any right to legislate any further on the same matter. One of these exceptions is that an instrument of vacation of plats shall be approved by the City Council. This specific authority granting to the City Council the power to approve vacation of plats is not so important merely because of the power granted to the city, but it clearly indicates that the Legislature specifically granted to the City of Chicago that power which it contemplated it should have and no other.

Another section in the statute giving the City Council power to legislate on the matter of plats is Section 5, Article X, of the Cities and Villages Act, which provides, in part, as follows:

“The City Council * * * shall have the power to provide, by ordinance, that any map, plat, or subdivision, of any block, lot, sub-lot, or part thereof, or of any piece or parcel of land, shall be submitted to the City Council * * *, or to some officer to be designated by such Council * * *, for their or his approval; and in such cases no such map, plat or subdivision shall be entitled to record in the proper county, or have any validity until it shall have been so approved.”

The aforesaid section is the strongest one in favor of giving the City Council power to enact the proposed ordinance. But the section does not give the City Council authority to arbitrarily reject a plat of a subdivision. On the contrary, if a plat is properly executed in compliance with the statute, mandamus will lie to compel the approval of the plat if it is shown that the withholding of the approval is arbitrary and unlawful.

The People v. Board of Trustees of Village of Mounds, 122 Ill. App. 449.

The aforesaid case, in effect, held that a municipal corporation cannot by ordinance or by the action of its governing body practically nullify the effect of the statute which gives to the owner of land the right to subdivide the same; all that it is authorized to do is to see to it that the plat in question is in compliance with the statute and *is in conformity with any reasonable regulations* or requirements respecting the size of the blocks and lots, the direction and width of the streets and alleys, and other details of survey. The court on page 451 said:

“By Section 5, Article X, Chapter 24 (Cities and Villages) Revised Statutes, power is given to the board of trustees of a village to provide by ordinance that a plat of any land within the corporate limits of such village shall be first submitted to the board of trustees or to some officer designated by said board for approval; and until it has been so submitted and approved it shall

not be entitled to record. Surely it was never intended by the Legislature to clothe a village board or village officer with power to annul chapter 109 (Statute on plats and maps) in its application to the platting of land within the corporate limits."

On page 452 of the same case, the court held, in part, the following:

"His (owner of land) right to subdivide and plat it is a substantial right sanctioned and regulated by chapter 109, but it was given to the village board to see that the plat was made in compliance with the statute and in conformity with any reasonable regulations or requirement by ordinance respecting the size of the blocks and lots, the direction and width of the streets and alleys, or other detail of the survey. In our opinion this is the extent to which the discretion was given the board."

The power of the City Council to provide, by ordinance, that any map or plat shall first be submitted to the City Council or to some designated officer for their or his approval before it is recorded, cannot be construed as giving the City Council the power to enlarge or diminish the requirements as laid down by the Statute on Plats, etc.

Chicago v. Burke, 226 Ill. 191.

The People v. Trustees of Village of Mounds, supra.

It shall be for the City Council or its duly appointed officer to ascertain whether or not the plat or map has been complied with according to the terms of the statute and if the plat or map, in the discretion of the City Council or its officer, is not executed according to the law it will be rejected. The purpose of the aforesaid section is to obviate the recording of defective maps, and to see that the city's right in the streets and alleys as prescribed by the statute are fully protected. Therefore, if the Superintendent of Maps (Ex-officio Examiner of Subdivisions) is asked to approve a map that complies entirely with the statute, he is bound to do so and has no further discretion in the matter; but he does not have the discretion of deciding whether or not the plat or map complies with the statute. Consequently, if the city had any right, power or authority in the matter in question, it

would have to be found in the statute, either expressed or implied, and by reason of the fact that there is no such power, the City Council has no proper authority to enact the contemplated requirement.

It is an obvious fact and common knowledge to the writer that the proposed ordinance is very commendable, and would avoid considerable fraud and misrepresentation, but, admitting all this, such ordinance after its passage would be held void by the court, and it would be a useless performance to pass it by the City Council.

We are, therefore, of the opinion that the proposed ordinance as stated in your letter would be held by our courts to be beyond the scope of the city's power, and hence, declared void.

Yours very truly,
HARRY F. CHAVERIAT,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Furnishing Water to International Harvester Co., From
Fullerton Avenue Conduit.**

January 14, 1922.

HON. CHARLES M. FRANCIS, Commissioner of Public Works.
Dear Sir:

We are in receipt of your request for an opinion relative to whether you would be justified in enforcing Section 2788 of the Chicago Code in relation to water taken by the International Harvester Company from the Fullerton Avenue conduit, said company having heretofore operated under special agreements with the city (now abrogated) and paid only a nominal sum for such water.

We note from the correspondence you submitted to us that the company refuses to pay the regular water rates on two grounds:

1. That the conduit is not a regular water conduit, but was originally built as a sewer, and that the quality of water

in the same is not up to the standard of that which the city sells to other water users; and

2. That the city has permitted the waters of the Chicago river, of part of which the company is a riparian owner, to become polluted by sewers, rendering the same less fit for the company's use, wherefore the city ought to permit the company to take water from the conduit instead, free of charge.

Sections 2787 and 2788 of the Chicago Code read as follows:

"2787. WATER DRAWN FROM CITY TUNNELS. All persons, firms or corporations taking water from any water tunnel constructed by the City of Chicago, by means of a direct connection therewith, shall pay for such water the meter rates prescribed in this chapter less two cents per thousand gallons. All such water shall be measured by meters installed by the user at his own expense, and all such meters shall be approved by the commissioner of public works.

"2788. WATER DRAWN FROM CITY CONDUITS. All persons, firms or corporations drawing any water from any conduit constructed by the City of Chicago, other than a water tunnel, shall pay therefor at the rate of one dollar per year per horsepower, when such water is used for condensing purposes only, and an additional charge of fifty cents per horsepower per year, when such water is used for boiler feed purposes. Whenever any water is drawn from such conduit for purposes other than condensing or boiler feed, the user thereof shall pay the meter rates prescribed in this chapter, less two and one-half cents per thousand gallons. All water drawn from such conduits, and used for purposes other than condensing or boiler feed, shall be supplied by a separate pump and measured by a meter installed by the user thereof at his own expense, each meter to be approved by the commissioner of public works."

The fact that the conduit here in question was not originally built as a regular water conduit, and that the water it supplies is not up to the standard of that passing through other conduits, are no doubt equitable reasons which the company might present to the City Council as grounds for a modification of the present ordinance. But, in our opinion, Section 2788 of the ordinance as it now stands, draws no distinction between different kinds of conduits, or different qualities of

water, but makes one rule applicable to them all. As long as the ordinance stands unmodified, therefore, we are of the opinion that you are not at liberty to make any special rates to the International Harvester Company.

If, as the company intimates, they have a claim against the city for pollution of the Chicago river, that is a separate and distinct question, which, in our opinion, has no legal connection with the question of water rates, but should be settled separately.

However, we do not think there is any merit in their claim relative to pollution of the Chicago river. For while it may be true that a city has no natural right to use a stream of water for sewerage purposes, without the consent of the riparian owners (*City of Kewanee v. Otley*, 204 Ill. 417), yet such right may be acquired by *prescription*.

Missouri v. Illinois, 200 U. S. 496.

Cleveland v. Standard Bag Co., 72 Ohio St. 324.

Smith v. Sedalia, 152 Mo. 283.

Black's Pomeroy on Water Rights, Sec. 152.

Angell on Water Courses, Sec. 208.

Gould on Waters, Sec. 329.

The City of Chicago has been using the Chicago river for sewerage purposes, uninterruptedly and under a claim of right, for such a long period of years, that it is certainly too late now for any riparian owners to question that right, unless the pollution caused thereby should suddenly assume new and extraordinary proportions, and nothing of that kind is claimed; on the contrary, the company admits that the waters in the river are much purer now than they were years ago. We are of the opinion therefore that the company's claim because of supposed pollution of the river, has no legal basis.

As to the company's claim to equitable consideration in the matter of special rates because of the special nature of this conduit and the quality of water therein, that is a matter they ought to present to the City Council, if they desire any reduction. We can see no reason why they should expect you to take the initiative in the matter. Until the City Council shall decide to grant them special rates, the commissioner of

public works has no power to relieve them from paying the regular rates.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Change in Status of Depositary of City Funds.

January 18, 1922.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

We are in receipt of your letter of recent date concerning the reorganization of the Englewood State Bank and the change of name to First Englewood State Bank.

It appears that on or about January 7th the Englewood State Bank was a depositary of city funds and the city had \$50,000 on deposit; that this sum is secured by a bond signed by the Aetna Casualty and Surety Company as surety; that the bank was taken over by a new organization named First Englewood State Bank; and that the bond was indorsed by the surety company for the ostensible purpose of continuing same for the organization thus substituted.

On this state of facts you ask whether the reorganized bank is a legal city depositary and whether the city is protected by the endorsement of the Aetna Casualty and Surety Company.

If we are to take at their literal face value the statements of the president contained in his letter of January 7th, we will be compelled to hold that the new organization is not a city depositary. He says that the bank has been taken over by "a new organization" and that the city's balance "has been transferred to the new bank." Under such circum-

stances it is manifest that the new bank has not qualified or been accepted as a depositary and that it would not be possible, under the terms of the ordinance, advertisement or bid, to accept it as a depositary so soon after being organized.

The only reason why we are in a slight degree of doubt is because the officers of the bank seem to be going on the assumption that the institution is the same, and the words of the president may have been overstating the facts. That is to say, such a thing as a reorganization is possible without a loss of identity, and it is possible even to change the name of such a corporation without taking out a new charter. However, since we have nothing before us which indicates that the situation has been misstated, we must advise you that the new bank is not a city depositary.

As to the safety of the deposit in the bank, there is no doubt that the original bond, without endorsement, protects the city, especially if no money has been deposited since the change took place.

We do not favor the method of transferring the liability by the endorsement. Such endorsement is for the benefit of the city, but the city is not a party to the agreement, has not paid the consideration which is given therein as the moving cause for making the transfer, the bond as amended has not been approved by the City Council, and in other respects the procedure is subject to legal objections.

If it should appear, on a later showing as to the facts, that the reorganized bank has not lost its identity, we would regard it as essential either to stand on the old bond (in which event new deposits should not be made) or to require an entirely new bond for submission to the City Council.

We return herewith two letters and the endorsement of the surety company which accompanied your letter.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Scope of Examination for Stationary Engineer.

January 23, 1922.

HON. PHILIP M. GIESELER, President, Board of Examining Engineers.

Dear Sir:

We are in receipt of your letter of January 19th in which you state that an applicant for a stationary engineer's license received only 58% as the result of his examination and that the minimum passing mark is 70%. You further stated that the said applicant advised your board that his only experience had been in operating engines for hoisting and portable work and demanded that he be given an examination covering only that particular class of work.

You asked us to advise you whether or not it is mandatory for your board to comply with the applicant's demand and give him an examination covering only the particular class of apparatus which the said applicant wishes to operate.

The powers of the Board of Examiners of Stationary Engineers are defined by Chapter LXIX of The Chicago Code of 1911. Section 2370, which is a part of said chapter, reads as follows:

“APPLICANT'S QUALIFICATIONS. An applicant for an engineer's license shall be a machinist or engineer, having at least two years' practice in the management, operation or construction of steam engines and boilers. An applicant for a boiler tender's license shall be a person who has a thorough knowledge of the construction, management and operation of steam boilers. Each engineer and boiler or water tender so to be licensed shall be at least twenty-one years of age, shall be of temperate habits and good character, all of which shall be vouched for in writing by at least two citizens of Chicago, or shall be verified under oath by the applicant when required by the board of examiners.”

The City Council passed this ordinance by virtue of the authority conferred upon it by an act of the State Legislature approved June 3, 1889, said act now being designated as Sections 534 and 535 of Chapter 24 of the Statutes of the State of Illinois.

When the constitutionality of this act was before the Supreme Court of this state in the case of *D. G. Ballard v. City of Chicago*, 69 Ill. App. 638, the court said:

“The system and the intention of the law is in the direction of safety to life and property, and the ordinance and regulations being lawful, reasonable and uniform, should be upheld.”

Also in the case of *Henry B. Douglas, Mayor et al. v. The People ex rel. J. J. Ruddy*, 225 Illinois 536, the Supreme Court said:

“The right of a citizen to follow any legitimate business or occupation as a means of livelihood is subject to the paramount power of the State to impose any reasonable regulations the public welfare may require.”

It is therefore, our opinion, that if, in the judgment of the Board of Examiners of Stationary Engineers, the public welfare requires that a stationary engineer shall be qualified to operate all classes of stationary engines and boilers and not simply one particular class, that your board has the authority to refuse to give the applicant an examination based only on the apparatus used in hoisting and portable work.

Yours very truly,

FRANK W. DERBY,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Locking of Gates on Elevated Trains.

January 27, 1922.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

Replying to your request for an opinion relative to what power, if any, your department has to enforce a certain resolution adopted by the City Council on January 18, 1922, requiring the Northwestern Elevated Railroad Company to operate its cars with all the doors or gates unlocked, we beg to

state that, in our opinion, your powers in that matter are very limited.

In the case of some sudden emergency, such as fire or other accident, probably nobody would question the right of the police to interfere and open the doors and gates or cause them to be opened. But in the absence of such emergency, when it is merely a question of a general policy as to the best manner of operating the cars, it appears to us to be a matter of "regulation of a public utility," in which the Illinois Commerce Commission is vested with sole and exclusive jurisdiction.

Section 8 of "An Act concerning public utilities," approved June 27, 1921, reads, in part, as follows:

"The commission (Illinois Commerce Commission) shall have general supervision of all public utilities, except as otherwise provided in this act, shall inquire into the management of the business thereof and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine such public utilities and keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipment and other property owned, leased, controlled or operated, are managed, conducted and operated, not only with respect to adequacy, security and accommodation afforded by their service but also with respect to their compliance with the provisions of this act and any other law, with the orders of the commission and with the charter and franchise requirements."

A number of other provisions of the act specify the power of the commission, in this regard, in further detail.

We are of the opinion, therefore, that the question under consideration falls entirely within the jurisdiction of the Illinois Commerce Commission, and that, except in the case of emergencies, your department has no jurisdiction in the matter.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Frontage Consent for Morgue or Undertaking Establishment.

January 30, 1922.

HON. JOHN DILL ROBERTSON, M. D., Commissioner of Health.
Dear Sir:

Your letter of recent date, concerning the interpretation of the ordinance requiring frontage consents on residential streets in the case of morgues or undertaking establishments where dead bodies are received, was referred to the undersigned for consideration and reply.

It appears that a license for the kind of undertaking establishment in question has been applied for to be located at the premises known as 2700 East 75th street. This number is at the corner of Coles avenue, which is strictly residential, although 75th street at this point is a business street.

The question asked is whether such a license must be granted without the securing of frontage consents.

The ordinance involved is Section 1238 of The Chicago Code of 1911, as amended on January 3, 1922. (Council Journal, p. 1585.) So much of said ordinance as need be considered in determining this question reads as follows:

“* * * it shall also be unlawful for any person to establish or maintain a morgue or to carry on the business of an undertaker as defined in this article, who, in connection with such business receives at his place of business the body of any dead person for embalming or other purposes, on or along any street in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes without the written consent of a majority of the property owners according to the frontage on both sides of such street in such block; * * *.”

The one feature in which the above frontage consent provision differs from all others now contained in the general ordinances of the city is in the use of the words “on or along any street.” We have searched the ordinances diligently and fail to discover any similar wording in any ordinance requiring frontage consents, although the words “on” or “upon” frequently appear as indicating the scope of such requirement.

To illustrate: In Section 712 of the Code, which requires

such consents for a large number of occupations, the wording is "on any lot fronting on any street," etc. In Section 169, relating to bowling alleys, the provision reads "in any building located upon any street or alley in any block," etc. In the case of shooting galleries (Section 2273) the wording is "upon any street or alley in any block," etc.

Thus, we could go through the entire list and find no other provision requiring frontage consents where the location to be controlled is "on or along" a street. We must conclude from this that the City Council had a purpose in view in using these words, and that the provision is different from the similar ones where the words "or along" are omitted. Undoubtedly the council intended that residential streets should be held immune from the location of this class of business where it was objectionable to the owners of property even though the place was only alongside of such residential street and fronted on a business street.

There are many ordinances where the business prohibited within certain districts or limited so that frontage consents are to be obtained are of such a nature that they are offensive even though not fronting or alongside of the particular street. In such cases it is sometimes necessary to secure frontage consents all around the block or the business is prohibited a certain distance from the corner, or other restrictions are imposed. But this business is not of that character and seems to be in a class by itself. Hence, the peculiar provision.

When we look for a reason for a provision that is so distinctly at variance from all others in the code we find that the objectionable features of this class of business prevail on a street alongside of the establishment as well as one in front of it, and there seems to be abundant authority for sustaining such a provision as a reasonable one.

In *Densmore v. Evergreen Comp.*, 31 L. R. A. (n. s.) 608, the court said, among other things:

"The question before us is whether such an establishment by reason of its location, and being operated in a legitimate manner, may be or become a nuisance within the definition of the statute of this state. * * * In this case as in that, the element of comfort and repose in

the enjoyment of the home becomes an essential element of our inquiry; for it is not only shown by the evidence, but it may be accepted as within the common knowledge of man, that the immediate presence of those mute reminders of mortality, the hearse, the chapel, the taking in and carrying out of bodies, the knowledge that within a few feet of the windows of one's dwelling house, where the family sleep and eat and spend their leisure hours, autopsies are going on, that the dead are there,—can not help but have a depressing effect upon the mind of the average person, weakening, as the testimony shows, his physical resistance, and rendering him more susceptible to contagion and disease. * * *''

In the case of *Saier v. Joy*, 164 N. W. 507 (Mich.), the opening of a morgue and undertaking establishment in a residential district was enjoined as a nuisance, and a number of similar cases are mentioned in the note appearing in L. R. A. 1918A at page 829.

In view of the apparent intention of the City Council and the authorities we cite, which throw light on such intention and support its validity, we are of the opinion that the provision in question is designed to apply and must be applied in a case like the one before us, and that frontage consents will have to be obtained in the residential block in question before a license can lawfully issue.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Lawfulness of Proposed Entertainment.

January 30, 1922.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

We are in receipt of your communication of the 26th instant, requesting an opinion from the corporation counsel relative to the legality of a proposed entertainment to be given

by Square Post No. 232, American Legion of Illinois, at Midway Gardens, 61st street and Cottage Grove avenue, February 13th to 17th next, a part of said proposed entertainment being thus described:

“There is about 600 feet of scenery which will transform the hall into a representation of a mining camp, and one of the features is a gambling hall fitted up with gambling paraphernalia. These games will be played with bogus money furnished with the ticket of admission, but no actual gambling for money will be allowed. The money derived from the show is to be used in helping ex-service men.”

Sections 126 to 128 of the Criminal Code of Illinois, read as follows:

“126. GAMING.) § 126. Whoever shall play for money, or other valuable thing, at any game with cards, dice, checks, or at billiards, or with any other article, instrument or thing whatsoever, which may be used for the purpose of playing or betting upon, or winning or losing money, or any other thing or article of value, or shall bet on any game others may be playing, shall be fined not exceeding \$100 and not less than \$10.

“127. GAMING HOUSE.) § 127. Whoever keeps a common gaming house, or in any building, booth, yard, garden, boat or float, by him or his agent used and occupied, procures or permits any persons to frequent, or to come together to play for money or other valuable thing, at any game, or keeps or suffers to be kept any tables or other apparatus, for the purpose of playing at any game or sport, for money or any other valuable thing, or knowingly rents any such place for such purposes, shall, upon conviction, for the first offense be fined not less than \$100, and for the second offense be fined not less than \$500, and be confined in the county jail not less than six months, and for the third offense shall be fined not less than \$500, and be imprisoned in the penitentiary not less than two years nor more than five years.

“128. GAMING IN TAVERNS.) § 128. Every tavern keeper, common victualer or other person, keeping or suffering to be kept, in any place occupied by him, any implements such as are used in gaming, in order that the same may, for hire, gain or reward, be used for the purpose of amusement, who suffers any implement of that kind to be used upon any part of his premises, for the purpose of gaming for money or other property, or who

suffers any person to play at an unlawful game or sport therein, shall for the first offense be fined \$100, and for the second offense be fined not less than \$500 and be confined in the county jail not less than six months, and for the third offense shall be fined not less than \$500 and be imprisoned in the penitentiary not less than two nor more than five years, and in either case he shall forfeit his license, and shall not again be licensed as a tavern keeper for one year from his conviction."

You will note that the thing forbidden in each of these sections is "gambling for money or other valuable thing." The above sections of the Criminal Code are the basis of Sections 977 to 984 of The Chicago Code of 1911, in which sections, the thing forbidden also is "gambling for money or other valuable thing."

If, therefore, there will be no gambling for money at the proposed entertainment, we are of the opinion that it would not violate the statute or the ordinance relative to gambling.

However, you will have to determine, from your practical experience, the question whether it will be possible to let a fake gambling hall of this character run and still be possible to prevent actual gambling being conducted there. If you find that it would be impracticable to prevent actual gambling for money taking place there, it is, of course, within your power, as superintendent of police, to refuse to permit such an entertainment to be held.

Very truly yours,

CARL J. APPELL,

Approved: *Assistant Corporation Counsel.*

SAMUEL A. ETTELSON,

Corporation Counsel.

Interpretation of Section 55 of Policemen's Annuity and Benefit Fund Act.

January 30, 1922.

PETER S. LYNCH, Secretary, Retirement Board of the Policemen's Annuity and Benefit Fund, City Hall, Chicago.

Dear Sir:

We beg leave to acknowledge the receipt of your re-

quest for a construction of Section 55 of the act entitled, "An Act to provide for the creation, setting apart, maintenance and administration of a policemen's annuity and benefit fund in cities having a population exceeding two hundred thousand inhabitants," approved June 29, 1921, in force and effect July 1, 1921, and to advise you what annual pension should be granted to police officers who have completed a service of twenty years in the department and have reached the age of fifty years, and whether said Section 55 in any way regulates or controls the amount of annuity to be granted to such police officers.

In reply, we beg leave to advise you that, in order to answer your inquiries, it will be necessary for us to consider and call your attention to parts of Section 12 of said act (page 271, Laws of Illinois, 1921), which defines the meaning of certain words and phrases as used in said act, and which are as follows:

" 'Future Entrant': Any policeman who shall be employed as a policeman of such city for the first time on or after the first day in the month of January of the first year after the year in which this act shall come in force and effect in such city.

" 'Present Employe': Any policeman who shall be in the employment of such city as a policeman thereof on the thirty-first day in the month of December of the year in which this act shall come in force and effect in such city.

* * * *

" 'Salary': Annual Salary: *Provided*, that two thousand six hundred dollars (\$2,600.00) shall be the maximum amount of the annual salary of any policeman which shall be considered for any purpose under this act. Any amount of annual salary in excess of said amount of two thousand six hundred dollars (\$2,600.00) which any policeman shall receive shall not be considered for any purpose under this act."

Section 55, which appears on page 309, Laws of Illinois, 1921, reads as follows:

"Notwithstanding the provisions of any foregoing section or sections of this act, any present employe who shall resign or be discharged from the service on or after

the first day in the month of January of the first year after the year in which this act shall come in force and effect in such city, and after he shall have completed twenty (20) or more years of service and for whom the amount of annuity provided in accordance with the foregoing provisions of this act shall be less than the amount stated hereinafter in this section shall have a right to receive annuity as follows:

“Any such present employe who shall be fifty (50) or more years of age at the time of his resignation or discharge from the service shall have a right to receive annuity, from and after the date of such resignation or discharge, of an amount equal to fifty (50) per cent of the salary of such present employe as such salary shall be at the time of his resignation or discharge from the service.

“Any such present employe who shall be less than fifty (50) years of age at the time he shall resign or be discharged from the service shall have a right to receive annuity, from and after the date upon which he shall become fifty (50) years of age, of an amount equal to fifty (50) per cent of the salary of such present employe as such salary shall be at the time of his resignation or discharge from the service but not in excess of the sum of nine hundred dollars (\$900.00) a year.”

In discussing the construction of statutes, our Supreme Court, in the case of *People v. Rose*, 166 Ill., page 432, said:

“Now, it is a settled rule of construction that where there are two provisions, one of which is general and designed to apply to cases generally, and another is particular and relating only to one subject, the particular provision must prevail and it must be treated as an exception to the general provision. This rule is stated in Endlich on the Interpretation of Statutes (Sec. 399), as follows: ‘In such cases the special provisions upon that particular subject indicate an intention that it is not to be included in the general provision, and the latter is held inapplicable to it, or, as is sometimes said, is controlled by the special provisions. Where, therefore, there is in the same statute a particular enactment and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the par-

ticular enactment. It follows that where an act in one set of provisions gives specific and precise directions to do a particular thing, and in another set prohibits in general terms, the doing of that which, in the broad sense of the words used in the latter, would cover the particular act authorized by the former, the more general provisions can not be deemed to include the matters embraced in the more special ones.' ”

The term “Annual salary” as defined in said Section 12 of said act is defined to mean “two thousand six hundred dollars (\$2,600.00) per annum.” It also provides that “Any amount of annual salary in excess of said amount of two thousand six hundred dollars (\$2,600.00) which any policeman shall receive shall not be considered for any purpose under this act.” The language used could not be more sweeping to make it general, or to make it apply generally in the construction of the provisions of the act in question.

An examination of the provisions of Section 55 forces us to the conclusion that, while the said section contains words that compel us to conclude that it was the intention of the General Assembly to have the said Section 55 modify and control the provisions of all other sections of the act, such control or modification is limited only to present employes, and the amount of annuity that future employes, within the meaning of the act, shall annually receive is in no way affected by the provisions of said Section 55. It therefore follows that, the terms and provisions of said Section 55 being special, and not general provisions, under the rule of construction repeatedly announced by our Supreme Court, the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment and the terms and provisions of Section 55, which only affects the annuity to be granted to present employes, must control and supersede the provisions contained in Section 12.

In conclusion, we, therefore, beg leave to advise you that any present employe who shall have completed a service of twenty years or more, and for whom the amount of annuity provided in accordance with the provisions of the act en-

titled, "An Act to provide for the creation, setting apart, maintenance and administration of a policemen's annuity and benefit fund in cities having a population of two hundred thousand inhabitants," shall be less than the amount stated hereinafter, shall have a right to receive an annuity as follows:

"Any such present employe who shall be fifty (50) or more years of age at the time of his resignation or discharge from the service shall have a right to receive annuity from and after the date of such resignation or discharge of an amount equal to fifty (50) per cent of the salary of such present employe as such salary shall be at the time of his resignation or discharge from the service.

Any such present employe who shall be less than fifty (50) years of age at the time he shall resign or be discharged from the service shall have a right to receive an annuity from and after the date upon which he shall become fifty (50) years of age, of an amount equal to fifty (50) per cent of the salary of such present employe as such salary shall be at the time of his resignation or discharge from the service but not in excess of the sum of nine hundred dollars (\$900) a year."

Yours truly,

JAMES W. BREEN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Encroachment of Railroad on Street.

February 6, 1922.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

In regard to your request for an opinion relative to the tracks of the Chicago, Burlington & Quincy Railroad Company which encroach upon 20th street near Western avenue:

Such an encroachment upon 20th street as shown in your attached diagram is a public nuisance. The law is that every actual encroachment upon a highway by the erection of a

fence, or building thereon, or any permanent or habitual obstruction thereof, may safely be said to be a nuisance, even though it does not operate as an actual obstruction of public travel. (1 Wood on Nuisances, page 302.) Thus, in the case of *Advance Elevator Company v. Eddy*, 23 Ill. App. 352, it was held that the obstruction of an alley by a railroad embankment without public authority, is a public nuisance.

The Cities and Villages Act, Article V, par. 62, gives the City Council the power to dispose of such encroachments in the following provisions:

“§7. To lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds and vacate the same.”

“§10. To prevent and remove encroachments or obstructions upon the same.”

“§75. To declare what shall be a nuisance and to abate the same; and to impose fines upon parties who may create, continue, or suffer nuisances to exist.”

In pursuance of this grant of authority, The Chicago Code of 1911 embodies the following provisions:

“Chapter LVI. Police.

“Article I. General superintendent of police.

“1916. Duty to Abate Nuisances, etc.) He shall take notice of all nuisances, impediments, obstructions and defects in the streets, avenues, alleys, and public places of the city, and shall remove the same, or cause immediate notice thereof to be given to the proper officer whose duty it may be to take measures in relation thereto, according to the ordinances of the city.”

Therefore it is our opinion that after due and reasonable notice of an intention so to do, the superintendent of police, or his agents lawfully authorized for that purpose, may summarily abate the nuisance by tearing up and removing the tracks wherever they encroach upon the city streets.

It may be noted, that the law of adverse possession does not apply against the city as regards public streets, and, therefore, the railroad company can not acquire any rights by a previous adverse using of the land.

City of DeKalb v. Leineg, 193 Ill. 185.

Jordan v. City of Chenoa, 166 Ill. 530.

City of Sullivan v. Tichenor, 179 Ill. 97.

Yours very truly,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Annexation of Western Half of Portion of Western Avenue.

February 8, 1922.

HON. EDWARD J. GLACKIN, Secretary Board of Local Improvements.

Dear Sir:

We have your letter in which you inquire what steps must be taken by the city to have the western half of Western avenue annexed to the city at certain points mentioned therein.

It appears that between 87th and 91st streets, also between 97th and 99th streets, and also between 115th and 119th streets, the property west of this street is in unincorporated territory; that between 91st and 97th streets such property is in the Village of Evergreen Park.

With respect to the territory located in Evergreen Park, there are four ways of annexing to Chicago.

The first and simplest method would be under Section 3 of the Annexation Act of 1872, as amended. (Hurd, 1919, Ch. 24, Sec. 197.) This provides that on petition in writing of one-half the legal voters and one-half the property owners in the portion of the territory to be annexed (not more than 160 acres) the Board of Trustees of Evergreen Park, by two-thirds vote, may consent to disconnect and the City Council of Chicago, by a like vote, may annex.

Another way of doing this would be by proceeding under Section 2 of the Act of 1889, as amended (Hurd, 1919, Ch. 24, Sec. 212.) Here the extent of the territory to be annexed would have to be not less than one-half square mile;

the petition would require the signatures of 100 legal voters, and the proposition to annex would have to be voted on by the city, by the village, and by the part of the village to be disconnected and annexed to Chicago. There would have to be a majority of the voters who vote on the proposition in all three of these jurisdictions in favor of annexation in order to effect such disconnection and annexation.

The other two ways of annexing would be the ways provided for annexing the whole of the Village of Evergreen Park, which could be done under either of the two acts above mentioned. We understand, however, that there is no intention of annexing the whole of the village, therefore we need not speak more fully about these methods.

With respect to the unincorporated territory, there is only one way of annexing same provided by statute. Under Section 1 of the Act of 1872 above mentioned (Hurd, 1919, Ch. 24, Sec. 195), a petition, signed by a majority of the property owners and a majority of the legal voters in the territory to be annexed, may be submitted to the City Council, which thereupon must submit a proposition to annex the next regular election or at a special election called within 60 days after the petition is presented. The provision to submit to a vote seems to be mandatory, yet in case the City Council does not act the proposition would fail.

The writer is advised that there is a likelihood of one or more of the pieces that it is proposed to annex having no legal voters living therein. If that is the case an unusual condition is presented that was not contemplated by statute, and we have no means of determining whether the courts would hold any annexation legal. It may be, on the other hand, that the courts would regard the statute as complied with if the petition is signed by a majority of the property owners and a showing made to the effect that there are no legal voters within the territory to be annexed.

Yours truly,

LEON HORNSTEIN,

Approved: *Assistant Corporation Counsel.*

SAMUEL A. ETTELSON,

Corporation Counsel.

Demonstrator's Vehicle License Plates.

February 8, 1922.

HON. AGE ZYLSTRA, City Collector.

Dear Sir:

We have your letter of January 27, 1922, above subject, in which you inquire as to whom you are authorized to issue demonstrator's license plates to.

These demonstrating plates are issued by authority of Section 2720 of The Chicago Code of 1911 as amended November 2, 1921 (page 1149 of the Journal of the Proceedings of the City Council of said date). The sixth paragraph of said section specifically authorizes their issuance to any dealer who is licensed under either the "Automobile Repair Shops Ordinance," the "Garage Ordinance" or the "Automobile and Accessories Dealers' Ordinance" so there can be no question as to your authority to issue to the above mentioned licenses.

The third paragraph of the said section reads as follows:

"Provided, however, that if any manufacturer or dealer in, any of the motor vehicles mentioned in this article shall make application to the city collector and shall state therein under oath that he is a manufacturer operating a plant for the construction of motor vehicles within the city, or a dealer in same with a salesroom located within the city, and that he desires a license plate to be used by him in testing or demonstrating such motor vehicles upon the streets of the city, and that he will use such license plates only for such purpose, the city clerk shall, upon the payment by such applicant of the fees hereinafter set forth to the city collector, issue to such manufacturer or dealer a distinctive license plate with a number thereon, which must be attached to or borne by any such motor vehicle while being operated upon the streets of the city for the purpose of testing or demonstrating such vehicle, and when any such vehicle is in use for such purpose and carries such license plate, no other license fee shall be collected under this article and no other city license plate need be affixed to such vehicle."

In the case of the *Chattanooga Plow Company v. Hays*, 140 South Western 1068, the Supreme Court of Tennessee

defined a manufacturer "as one engaged in making materials raw or partly finished, into wares suitable for use."

In the case of *Remy, Schmidt and Bleissner v. Healy*, 126 Northwestern 202, the Supreme Court of Michigan said:

"The term 'manufacturer' in its ordinary acceptance denotes one who, through his skill and labor, shapes or combines material into a new product."

In view of these decisions it is our opinion that any one who is operating any plant for the manufacture or assembling of motor cars is entitled to obtain dealers' demonstrating plates, as provided for in Section 2720, in order that he may be in a position to demonstrate or test said motor cars on the streets or other public places in the City of Chicago.

Yours very truly,

FRANK W. DERBY,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Illegal Sale of Intoxicating Liquor.

February 23, 1922.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

Replying to your oral request for advice as to the proper legal procedure for you to take in order to stop the illegal sale of intoxicating liquor at the establishment of Albert Bouche, 416 South Wabash avenue, Chicago, Illinois, I desire to advise you that Sections 3 and 7 of the Illinois Prohibition Act, in force and effect July 1, 1921, make it unlawful for any person, on or after the date when the said Prohibition Act becomes effective, to manufacture, sell, barter, transport, deliver, furnish, purchase or possess any intoxicating liquor, except licensed registered pharmacists who are authorized to sell intoxicating liquors for medicinal purposes upon a prescription issued by a duly licensed practicing physician.

Section 28 of the Illinois Prohibition Act makes it unlaw-

ful to have or possess any intoxicating liquor intended for use in violation of the said act.

Section 29 of the said Illinois Prohibition Act provides as follows:

“§ 29. Whenever complaint is made in writing, verified by affidavit, to any judge, having cognizance of criminal offenses, that complainant has just and reasonable grounds to believe and does believe that intoxicating liquor is manufactured, possessed, kept for sale, used, disposed of, or transported in violation of any law of this state, or any mash, still or other property designed for the illegal manufacture of liquor is possessed in any house, building, premises, boat, vehicle, receptacle or any other place whatsoever (particularly describing and designating the same) with the facts upon which such belief is based, the judge may issue a search warrant as hereinafter provided: *Provided, however*, no warrant shall be issued to search a private dwelling occupied as such unless such residence is a place of public resort or intoxicating liquor is sold or kept for sale or possessed therein in violation of the law, or any mash, still or other property designed for the illegal manufacture of liquor is therein kept. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process. * * *

We desire to call your attention to the provisions of Section 42 of the Illinois Prohibition Act, which reads as follows:

“§ 42. It shall be the duty of all municipal, county, and state officials to co-operate in the enforcement of this act.

“If any sheriff, deputy sheriff, chief of police, marshal, policeman, constable or other peace officer shall have knowledge, information or suspicion of any violation of any provision of this act, he shall diligently investigate and secure evidence of the same and shall, before the proper officer, make and sign complaint against the offending person, anything in the ordinance or by-laws of any municipality to the contrary notwithstanding.”

If any person illegally sells or purchases intoxicating liquor in the presence of any police officer, it is the duty of the officer to arrest such person with or without a warrant. If you suspect that the said Albert Bouche is engaging in the illegal sale of intoxicating liquor, it is your duty to diligently

investigate and secure evidence of the same, and this you can do by having investigators or police officers in citizens' clothes, not known to said Bouche, enter his said place of business and endeavor to purchase intoxicating liquors. If successful in purchasing the same, the most effective way for you to permanently abate the unlawful sale of intoxicating liquors by the said Bouche is for you to proceed under the provisions of Section 29 and obtain a search warrant, together with a warrant for the arrest of Bouche, and the search warrant will authorize and empower you to enter the premises of the said Bouche and seize all intoxicating liquors found therein. After you seize said liquors, have a portion of the same analyzed in the city laboratory in order to make the necessary proof at the trial as to whether or not the same are intoxicating liquors within the meaning of the Illinois Prohibition Act

Yours truly,

JAMES W. BREEN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Adoption of Amendment of Fifty Ward Act.

March 2, 1922.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

In response to your request for an opinion on the status of aldermen who were elected in the year 1920 and whose terms are extended under the provisions of an act passed at the last session of the General Assembly, we submit the following:

The so-called "Charter Amendment" of the constitution of the state (Art. IV, Sec. 34), gives the General Assembly power to "pass any law (local, special or general) providing a scheme or charter of local municipal government," also "all laws which it may deem requisite to effectually provide a com-

plete system of local municipal government'' for the City of Chicago.

This section can not be given so broad a meaning that it will overcome conflicting provisions of the constitution in the case of all local laws, since other provisions of the constitution are only affected or modified in so far as it is necessary to give effect to this amendment. (*Miller v. People*, 230 Ill. 65; *Feigen v. Schaeffer*, 256 Ill. 493.) But in so far as the local government is concerned, it wipes out all restrictions of the constitution with regard to the kind of provision that may be made for the city's municipal affairs or municipal officers, and gives the General Assembly a free hand, except with respect to street railroad grants, which are expressly excluded from the operation of this section.

It is provided, however, that no law based upon this amendment affecting the local municipal government of the City of Chicago shall take effect "until such law shall be consented to by a majority of the legal voters of said city voting on the question at any election, general, municipal or special." Therefore, the test to be applied in the case of any law which affects only the City of Chicago is, first, whether it is a local law passed under the authority granted by this amendment, and, second, whether such law affects the municipal government of the city.

In pursuance of the authority vested in it by the section above referred to, the Legislature in 1919 passed an act providing for the redistricting of the city into fifty wards and the election of one alderman from each of such wards. This act was submitted to the people on November 2, 1920, in accordance with a referendum clause contained therein, and adopted. It thereby became effective.

This act contained a provision to the effect that if it became operative too late to govern the general election for aldermen in 1920 but in time to govern such election in 1921 one alderman was to be elected from each ward in 1921. Thereby the council would consist of the aldermen elected in 1920 and the fifty new aldermen. By other sections it was provided that any redistricting ordinance adopted should

not apply to the election for aldermen in 1920, but in all other cases it should apply to the first general election held after the adoption of such an ordinance, and that in case of no redistricting ordinance being adopted elections from the old wards should be held until there is a redistricting.

There was no redistricting in time for the 1921 aldermanic election. Consequently an election was held in the old wards, and the council as at present organized is substantially the same as it would have been had there been no change in the law. Since then a redistricting ordinance has been adopted.

In 1921 the Legislature amended this fifty ward act so as to provide for an election for one alderman in each of the newly created wards in 1923 and also containing the following provision:

“The aldermen elected in the year 1920 shall continue to serve as aldermen until the general election for aldermen in the year 1923.”

This amendment in contemplation of law is precisely the same as a new act covering an entirely new subject. It is a local law applicable only to the City of Chicago, and is subject to all conditions imposed by the charter amendment, while on the other hand, if legally adopted, it overcomes all conflicting provisions of other sections of the Constitution which would render it unconstitutional if there were no charter amendment.

Such being the case, the question of whether this amendment of 1921 is now in force is of primary importance. There is a theory under which it may be possible to show that, whether or not this amendment is in force, the aldermen now sitting would be entitled to their seats until new aldermen are elected. But that theory would necessarily raise the question whether the section of the Act of 1919 which might operate to deprive a portion of the people of the city of representation in the council is constitutional and it would also involve the question of whether the aldermen from the new wards are in point of law successors to the aldermen from the old wards. These questions are involved and complicated

and could not be finally determined except by the decision of the court of last resort, while in the meanwhile every act of the council would be subject to doubt as to validity. We are therefore of the opinion that if the amendment of 1921 can be adopted it would do away with all the doubts and difficulties that are bound to arise.

It seems quite beyond question that the amendment of 1921 may properly be submitted to a vote of the people of the city, even though the act contains no provision for a referendum. In fact, it is contended by some, that the election commissioners are bound to place the question on the ballot.

The charter amendment does not prescribe any precise form or method by which the question of the adoption of laws framed under its provisions may be voted on. The form of the ballot, the time when the election is to be held, provision for resubmission, and all other matters connected with the submission of such question may be taken care of by itself (*Swigart v. City of Chicago*, 223 Ill. 371).

In the absence of such provisions in the act itself the law contemplates that the proper election officers may submit such a proposition, although the question as to whether they are bound to take note of such acts and determine for themselves whether or not it must be submitted by them to the voters is one on which we entertain some doubt.

Another question which gives us some doubt is whether the primary to be held in April is such an election as the charter amendment provides for when the words "general, municipal or special" are used.

We therefore believe that it would be better for the City Council to designate the date of the forthcoming primary as the date of a special election for the purpose of voting on this proposition and to prescribe the form of the ballot, with enough latitude in regard to this as will enable the election commissioners to determine for themselves what is the proper form.

If the proposition carries at such an election, any questions of irregularity, as to the proper calling of the election, the proper wording of the ballot, etc., would be reduced to the

minimum. The adoption of the act would avoid any further doubt as to what was the effect of the action of the Legislature and would do away with a number of very intricate questions of law that would otherwise arise.

We are satisfied that if the act is adopted on the referendum the provision for having the aldermen elected in 1920 continue in office will be held valid. This would be the case whether the aldermen to be elected in 1923 are in law successors to such aldermen or not.

In *Crook v. People*, 106 Ill. 237, it was held that where new municipal officers are to be selected under a new law these new officers are the successors of the corresponding officers under the old law, and further that the holding of the office by an incumbent until his successor was elected and qualified was not such an extension of a term as is prohibited by the constitution. Hence, there is good reason for assuming that our courts would hold such a provision as the one in question good even if this prohibition applied. But, as indicated in the first part of this opinion, we believe that this prohibition is overcome by the provision of the charter amendment which permits the passage and adoption of any local law relating to the municipal government in spite of contrary provisions in other sections of the Constitution.

In furtherance of the views expressed above, we have prepared draft of an ordinance calling for a special election and prescribing the form of ballot to be used, and we forward same herewith.

Yours truly,

LEON HORNSTEIN,

Approved: *Assistant Corporation Counsel.*

SAMUEL A. ETTELSON,
Corporation Counsel.

License Ordinance for Wholesale Tobacco Dealer.

March 4, 1922.

HON. AGE ZYLSTRA, City Collector.

Dear Sir:

We have your letter of March 1st, above subject, in which you inquire if the American Tobacco Company should

be required to take out a wholesale tobacco license. We have carefully considered the facts set forth in your letter and advise you as follows:

Section 1 of an ordinance licensing wholesale tobacco dealers, passed by the City Council on December 28, 1921 (page 1520 of the Journal of the Proceedings of said date) reads as follows:

“SECTION 1. WHOLESALE TOBACCO DEALER DEFINED.)

For the purpose of this ordinance a wholesale tobacco dealer is hereby defined to mean any person, firm or corporation selling, offering for sale, exposing for sale, or keeping with the intention of selling at wholesale any tobacco, snuff or cigars including leaf tobacco or any preparations containing tobacco, except cigarettes or cigarette papers.”

Taking this definition in its broad literal sense, there would seem to be no question that the American Tobacco Company is a “wholesale tobacco dealer.” But considering that a state, or a municipality thereof, has no authority to tax or otherwise “lay a burden upon” interstate commerce, but can only tax business done wholly within the state, any statute or ordinance which would go beyond those limits would be unconstitutional and void. And since we have no right to assume that the City Council meant to pass an unconstitutional and void ordinance, we must assume that the ordinance in question does not apply to wholesalers engaged solely in interstate commerce, and that if the American Tobacco Company is engaged solely in interstate commerce it is not such a “wholesale tobacco dealer” as is contemplated by the ordinance.

In the case of *Robbins v. Shelby County Taxing District*, 120 U. S. 495, the Supreme Court of the United States said as follows:

“The truth is, that in numberless instances, the most feasible, if not the only practicable, way for the merchant or manufacturer to obtain orders in other states is to obtain them by personal application, either by himself, or by some one employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind

and quality of the goods he proposes to sell, or which the other party desires to purchase. But the right of taxation, if it exists at all, is not confined to selling by sample. It embraces every act of sale, whether by word of mouth only, or by the exhibition of samples. If the right exists, any New York or Chicago merchant visiting New Orleans or Jacksonville, for pleasure or for his health, and casually taking an order for goods to be sent from his warehouse, could be made liable to pay a tax for so doing, or be convicted of a misdemeanor for not having taken out a license. The right to tax would apply equally as well to the principal as to his agent, and to a single act of sale as to a hundred acts.

“But it will be said that a denial of this power of taxation will interfere with the right of the state to tax business pursuits and callings carried on within its limits, and its rights to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent; but only in those cases in which the states themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution. And this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirement of a license, for making negotiations in the conduct of interstate commerce; and it may well be asked where the state gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of postmaster or United States marshal. The mere calling the business of a drummer a privilege can not make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country are citizens of the United States, as well as of the individual states, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them.

“To deny to the state the power to lay the tax, or require the license in question, will not, in any perceptible degree, diminish its resources or its just power of taxation. It is very true, that if the goods when sold were in the state, and part of its general mass of property, they would be liable to taxation; but when brought into

the state in consequence of the sale they will be equally liable; so that, in the end, the state will derive just as much revenue from them as if they were there before the sale. As soon as the goods are in the state and become part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held by this court in the case of *Brown v. Houston*, 114 U. S. 622. When goods are sent from one state to another for sale, or, in consequence of a sale, they become part of its general property, and amenable to its laws; provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are. *Brown v. Houston, qua supra; Machine Co. v. Gage*, 100 U. S. 676. But to tax the sale of such goods, or the offer to sell them, before they are brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce itself."

According to the letter you submitted to us from the attorneys for the American Tobacco Company, said company sells its goods in manner as follows:

"The American Tobacco Company sells its goods to jobbers only, but it is concerned with both jobbers and retailers, because it must see to it that its products get to the consumer fresh, and furthermore, that even the smallest retail stand has a full supply of all the job brands at all times. Accordingly, there are two classes of traveling men, one the so-called division man, who visits the jobbers and takes orders from the jobbers for goods to be shipped by the American Tobacco Company. The division man also has some supervision over what we call the retail salesmen. The name 'retail salesmen' implies that he is a salesman who visits the retail trade. He does not take orders for the American Tobacco Company; he takes orders from the retailer which are transmitted to the jobber and filled by the jobber. This does not mean exactly that he sends in an order for a shipment from the jobber's stock. In order to get quick distribution, we have a method that we call 'drop shipments,' that is, the shipment is made from the American Tobacco Company direct to the retailer, express prepaid, but the goods are billed to the jobbers that the retailer indicates, and in turn the jobbers bill the retailer. This is the kind of orders a retail salesman takes in the course of his business."

If, upon investigation, you find the facts to be as thus stated, we are of the opinion that the company in question is not liable for a license under and by virtue of the provisions contained in the ordinance above referred to.

Yours very truly,

FRANK W. DERBY,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Temporary Suburban Passenger Station of Union Station Company.

March 8, 1922.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

We have the letter of Robert Knight, Deputy Commissioner of Buildings, dated February 21, 1922, above subject. The question presented for our decision is whether or not you have the power to issue a permit to the Union Station Company to erect a temporary wooden suburban passenger station at Canal street and Jackson boulevard for use during the construction of the new Union Station.

Section 10 of the Union Station Ordinance, which was passed by the City Council on March 23, 1914 (page 4555 of the Journal of the Proceedings of the City Council of said date) reads as follows:

“Section 10. Permission and authority are hereby given to The Union Station Company, whenever the same shall be necessary for the prosecution of the work herein authorized to obstruct temporarily, any street, avenue and alley to such an extent and for such length of time as may be approved by the commissioner of public works; and it is also hereby authorized whenever the same shall become necessary, to erect and maintain temporary structures and false work in any of said streets and alleys during the construction of said station and facilities, subject to like approval of said commissioner

of public works. No changes of any kind shall be made or work done in any street or alley as herein authorized, by The Union Station Company, except upon plans and specifications approved by and under the supervision of the commissioner of public works, and upon a permit of said commissioner of public works allowing such work to proceed; provided, however, that if any street or alley so obstructed shall contain street railway tracks and such obstruction shall necessitate the building of new tracks or the making of new connections with existing tracks, in order to accommodate street railway traffic, the cost thereof shall be paid by The Union Station Company; reasonable notice of making all such obstructions shall be given to the street railway companies.

“In all cases where, in complying with the provisions of this ordinance, it is necessary to change or reconstruct street railway tracks and property, the work shall be done by the street railway companies owning the same and the cost thereof shall be paid by The Union Station Company.”

Taking the ordinance as a whole, we believe that it was the intention of the City Council to afford the Union Station Company every facility for the erection of the new passenger terminal, and to that end considerable latitude was given to the commissioner of public works in the matter of allowing temporary construction work to be used during the course of the improvement.

We accordingly advise you that in our opinion it would be perfectly proper for you to issue them a permit to build a temporary wooden suburban passenger station, if in your judgment, the temporary wooden building could be safely constructed, and provided it was in the opinion of the commissioner of public works a necessary incident to the Union Station project.

Yours very truly,

FRANK W. DERBY,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Entertainments Given in Armory.

March 9, 1922.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

Replying to your request for an opinion relative to whether entertainments given at the Broadway Armory, either by officers of the Illinois National Guard or by private parties to whom the premises are sublet for such purposes, are subject to the city ordinances governing amusement licenses, we beg to state that, in our opinion, they are subject to the same regulations in that regard as entertainments held elsewhere in the city.

We note from the correspondence submitted by you that the building is rented by the State of Illinois from the Chicago Arena Company, for the initial purpose of housing the 6th Regiment Infantry, Illinois National Guard, and that the officers in charge of the armory contend that, since the armory is state property, entertainments held there are, under no circumstances, subject to the amusement licenses required by the city.

The purpose of the ordinance in question is, of course, the safeguarding of life, health and public morals, and the license prescribed is one of the necessary means of regulation. The fact that certain premises may be state property is certainly no reason why the same should not be properly policed, nor why human life thereon should not be safeguarded and public morals protected. The only question we are concerned with in that regard is, who are the proper officials to do this? Ordinarily, the proper party to perform such duty is the police force of the city, and our supreme court has repeatedly held, that in the exercise of such duty the city police perform a state, and not merely a municipal duty, and that they are, in that sense, *state officers*. Likewise the court has held, that a city, in passing ordinances for the protection of life, health or morals, is performing a *state* duty, and is acting as the *agent of the state*.

City of Chicago v. Wright, 69 Ill. 318.

Culver v. City of Streator, 130 Ill. 238.

City of Chicago v. Williams, 182 Ill. 135.

Johnston v. City of Chicago, 258 Ill. 494.

The National Guard, however,—the military branch of the state government,—has no general police power. On the contrary, its powers are strictly limited to those conferred upon it by the State Military and Naval Code. (Ill. Revised Stat., Chap. 129.) By the terms of that code, the military officers have disciplinary power over the members of the National Guard, but they have practically no authority over the general public, except possibly when they are called out to *assist* the civil authorities. Thus, for instance, if any person molests, obstructs or interferes with any officer or soldier while on duty at parade or drill, the officers of the National Guard have no power to punish him; they may only apprehend him and turn him over to the sheriff or police to be dealt with according to law.

Military & Naval Code, Art. XIX, Sec. 4.

Even when on duty in case of riots, the officers of the National Guard have no power to prosecute or punish rioters, but must turn them over to the civil authorities.

Military & Naval Code, Art. XXII, Sec. 2.

And should any person cause a riot or disturbance at a public entertainment given by members of the National Guard or others at a state armory, the Military and Naval Code makes no provision whatever for their arrest or punishment. In our opinion, therefore, only the police of the city or the sheriff of the county would have any authority to arrest such persons.

We find nothing, either in the Military and Naval Code or in any other laws of the state, which grants to the National Guard, or any officers thereof, any exemption from compliance with the ordinary laws, statutes and ordinances of the state and the municipalities thereof. On the contrary, the whole spirit of our American institutions forbids the recognition of any "military caste," with its attendant special privileges and exemptions; and both our state constitution and our

statutes zealously guard against anything that might partake of that nature.

Article II, Section 15, of our state constitution says:

“The military shall be in strict subordination to the civil power.”

And the statutes of the state simply make the military power *one* branch or department of the government, just like, for instance, the sheriff, the public school boards, or the judiciary,—protected, indeed, from interference and molestations while *in active service*, engaged in its legitimate duties, but not otherwise exempt from obedience to the ordinary laws of the state. And except when in active service, members of the National Guard, whether officers or privates, are merely *plain* citizens, owing the same allegiance to the state, and subject to its laws in the same manner, as any other citizen.

Article XII, Section 4, of our state constitution reads as follows:

“The militia shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest *during their attendance at musters and elections, and in going to and returning from the same.*”

Article II, Section 6, of the Military and Naval Code reads as follows:

“Every officer and enlisted man of the National Guard or Naval Reserve shall be exempt from jury duty, from payment of road labor and head or poll tax of every description during the time he shall hold a commission as an officer, or be enrolled as an enlisted man therein; the exemption from jury duty shall continue after honorable discharge for a period equal to that honorably completed in the National Guard or Naval Reserve. The uniforms, arms and equipment of every member of the National Guard or Naval Reserve shall be exempt from all suits, distresses, executions or sales for debts or payment of taxes. The members thereof shall in all cases except treason, felony or breach of peace, be privileged from arrest and imprisonment by civil authority *while under orders in the active service of the state, from the date of the issuing of such orders to the time when such service shall cease.*”

This may be considered the charter of privileges and exemptions of members of the National Guard. But it will be noted that it is not essentially different from, for instance, the privilege of judges, attorneys, clerks of courts or sheriffs who are privileged from arrest while attending court, and while going to and returning from the same (Ill. Rev. Stat., Chap. 13, Sec. 9), nor from that of physicians and other professional men, who are exempt from jury service.

In August, 1915, certain enlisted men of Company E, 5th Infantry, I. N. G., while under orders to go into state encampment, and having donned their uniforms for that purpose, got intoxicated in public places in the City of Macomb, Illinois, in violation of the ordinances of that city which declared such public intoxication to be a breach of the peace. The police of the city went to the state armory to arrest them. Such arrest having been resisted by the officers of the National Guard, the matter was referred to Attorney General Lucey for decision. The Attorney General in an opinion addressed to the Adjutant General said:

“Under the general powers conferred upon cities to adopt ordinances for the preservation of good order, cities may, by ordinance, include intoxication in public places among offenses constituting a breach of the peace. *The right of the civil authorities under the constitution and laws of the State to arrest a member of the State Militia for treason, felony or breach of the peace, even when engaged in the active service of the State, is paramount and not to be questioned.* * * *

“Clothed with a valid warrant, based upon a complaint charging a breach of the peace, I am of the opinion that an officer would be *authorized to enter an armory for the purpose of arresting one who is a member of the State Militia* and who is there present in obedience to an order issued by the commanding officer. Under the constitution and laws of this state, a member of the militia, even when engaged in active service, is entitled to no exemption from arrest for treason, felony or breach of the peace.”

Opinions Atty. Gen. 1915, p. 229.

All of which shows that the law does not recognize the National Guard, or its members, as standing in any different position to the law than any other citizens.

In regard to armories, the Military and Naval Code says:

“The armory of each regiment, battalion, company, ship’s crew or division shall be subject to the order of Adjutant General and be under the charge of its commanding officer, who shall keep therein all property furnished by the state; no company or division shall be furnished with arms or equipments until a suitable armory shall be provided for such deposit.”

Mil. and Nav. Code, Art. XVIII, Sec. 3.

But it will be noted that this authority is not essentially different from, for instance, that of the sheriff over the courthouse (Ill. Rev. Stat., Chap. 125, Sec. 14) and that of school boards over school houses and other school property. If the sheriff should conclude that a part of the courthouse was not needed for public use, and should rent out the same for theatre purposes, it would hardly be contended that the party operating such theatre would be exempt from the city ordinances relative to amusement licenses. Should the sheriff operate the theatre himself, the principle would be the same, for he would be doing it simply in a private capacity, and not in his official capacity as sheriff, the operation of a theatre being no part of the duties pertaining to that office. The same would be true if the Board of Education of the City of Chicago should let some of its property for a like purpose. Indeed, we believe it is a fact that there are many theatres in Chicago located on land under the control and management of the Board of Education; yet we have not heard that any of them have ever claimed exemption from license fees on that account. The same would have to be said should the Sanitary District, or other public bodies owning real estate in Chicago, attempt to operate theatres on the same or rent it out for such purpose. The same rule applies, in our opinion, to an armory, or part thereof, rented out or otherwise used for public entertainments.

Nor does it, in our opinion, make any essential difference whether these public entertainments at the armory are in charge of officers of the National Guard, or in charge of private parties having no connection with that organization. We find nothing in the Military or Naval Code, or elsewhere

in the law, making such entertainments a part of the military duties of officers or enlisted men. Consequently, when they do promote the same, they are acting in their private and civil capacity, and not in a military capacity. This is an additional reason why they must comply with the same regulations as any other civilians engaged in the same pursuits.

We might add, however, that when the military authorities lease an armory, or a part thereof, to private parties, for purposes of entertainment or otherwise, this amounts, in law, to a temporary alienation or *sale* of the armory, and, for the time being, therefore, the armory, or so much thereof as is rented out, passes out of the hands of the military authorities and they have no control of the same.

What we have here stated as to jurisdiction over armories applies, however, only to state armories. It does not apply to forts or military reservations of the United States, for the reason that the United States government always insists, whenever it, by the consent of a state, acquires ground for such purpose, that it be given *exclusive jurisdiction* over the same, and consequently that all jurisdiction by the state cease. (U. S. Const., Art. I, Sec. 8, cl. 17; Barnes' Federal Code, Secs. 2980, 6273.) But such exclusive jurisdiction applies only to fixed *places* acquired by the Federal Government, and does not apply, for instance, to government vessels temporarily stationed in the water of a state (*United States v. Beavans*, 3 Wheat, 336; *Atlantic Transport Co. v. Imbrovak*, 234 U. S. 52).

We might also add that what we have said in regard to the powers of the militia has reference to *times of peace*. In times of war, when the militia is called into the service of the United States, the war power of Congress may be exercised to grant the military branch more extensive powers. With that, however, we are not at the present time concerned.

Our conclusion is, therefore, that the militia and its members are not, as regards rights and privileges, any different from any other citizens or officials; that their authority over the armory is no greater than that of other public officials over office buildings or rooms occupied by them, and that when they use the same for purposes not in the line of

their public duties, they are acting merely in a private capacity and are subject to the same regulation as other private citizens; that the militia has no general police power, but that the same is ordinarily reposed in the police force of the city; and that the same reasons exist for policing the armory and safeguarding the public there, when entertainments are given there, as apply to other places in the city.

For the reasons above set forth, we are of the opinion that city amusement licenses are required for public entertainments given in the armory in question.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Stamp Tax for Power of Attorney.

March 10, 1922.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

In reply to your letter of March 7, 1922, with reference to government stamp tax of 25% on powers of attorney when giving authority for drawing of pay due from the City of Chicago, we quote from Revenue Act of 1921, Title XI, Schedule A, paragraph 11 (Eleven):

“Power of attorney granting authority to do or perform some act for or in behalf of the grantor, which authority is not otherwise vested in the grantee, 25 cents. This subdivision shall not apply to any papers necessary to be used for the collection of claims from the United States or from any State for pensions, back pay, bounty, or for property lost in the military or naval service, nor to powers of attorney required in bankruptcy cases nor to powers of attorney contained in the application of those who become members of or policy-holders in mutual insurance companies doing business on the inter-insurance or reciprocal indemnity plan through an attorney in fact.”

We are of the opinion that the exemptions listed here do not include the case of power of attorneys for collection of pay due from City of Chicago.

Very truly yours,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

License for Coffee House.

March 22, 1922.

HON. AGE ZYLSTRA, City Collector.

Dear Sir:

Replying to your request for an opinion relative to your authority to issue a license for a coffee house or ordinary at West End avenue and Pine street, we beg to state, that neither the statutes of the state nor the ordinances of the city require any frontage consents to operate a coffee house or ordinary. Section 712½ of The Chicago Code of 1911, which prescribed such frontage consents for all retail businesses, in residence sections of the city, was declared unconstitutional by our Supreme Court in the case of *People ex rel. Friend v. City of Chicago*, 261 Ill. 16.

So far as appears from the facts stated in your letter, therefore, and assuming that the superintendent of police finds no objection to the moral character of the applicant, and the commissioner of health none to the sanitary condition of the premises, we know of no legal grounds for withholding a license, if a proper application is made, specifying the correct address, and the required fee is tendered.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Vehicle Licenses for U. S. Army Officers.

March 10, 1922.

WILLIAM C. RIGBY, Lieut. Colonel, Judge Advocate,
1819 West Pershing Road.

Dear Sir:

We have your letter of February 7th in which you ask us to advise you as to whether it is necessary for army officers, who are stationed in Chicago and who are not permanent residents of the city but are only temporarily here under orders of the War Department, to take out city vehicle licenses in order to operate their private cars on the streets and other public places of the City of Chicago.

Section 2717 of The Chicago Code of 1911 as amended reads as follows:

“2717. That it shall be unlawful for any person, firm or corporation residing within the City of Chicago to use, or to cause or permit any of his or its agents or employes to use, any motor vehicle upon the streets, avenues or alleys of the city, unless such motor vehicle be licensed as hereinafter provided; that it shall also be unlawful for any person, firm or corporation to use, or to cause or permit any of his or its agents or employes to use, any wagon or vehicle other than a motor vehicle upon the streets, avenues or alleys of the city unless such wagon or vehicle other than a motor vehicle, be licensed as hereinafter provided; provided, however, that this article shall not be construed as applying on street cars running on metallic rails.”

That a state or municipality has no power to require automobiles owned by the United States Government, or the chauffeurs driving the same, to be licensed, has been settled.

Johnson v. Maryland, 254 U. S. 51.

But in the present case a different question arises, since the automobiles are owned by the officers themselves, apparently for their own private use and without any governmental requirement to that effect.

But there is another reason which indicates that the ordinance does not apply to the officers in question. The ordinance, it will be observed, says:

“any person, firm or corporation *residing within the City of Chicago.*”

The officers, we understand, do not *reside* in Chicago. They are temporarily stationed here, but not within jurisdictional territory of the city, but upon a reservation, exclusive jurisdiction of which has been ceded by the State of Illinois to the United States.

According to the ordinary acceptance of the word, one who is merely temporarily domiciled in a place, without any intentions of remaining there permanently, does not “reside” there. But the City Council may have used the word in a somewhat broader sense in this ordinance.

However, it is apparent from the language of the ordinance that the City Council meant to make the *place* of residence of the owner of the automobile a test as to whether or not he shall be required to obtain a license; and we are of the opinion that the expression, “residing within the City of Chicago,” must be taken to mean “within the *jurisdictional* limits of the city.” For it can hardly be presumed that the City Council would legislate beyond its jurisdictional limits.

Sections 1 and 2 of Chapter 143, Hurd’s Revised Statutes of Illinois, read as follows:

“§1. *Be it enacted by the People of the State of Illinois represented in the General Assembly:* That the consent of the State of Illinois is hereby given, in accordance with the sixteenth clause, eighth section, of the first article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation or otherwise, of any land in this state required for custom houses, court houses, post offices, arsenals, or other public buildings whatever, or for any other purposes of the Government.

“§2. *That exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States, for all purposes except the administration of the criminal laws and the service of all civil processes of this State; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands.*”

We are of the opinion that army officers temporarily stationed on such military reservations do not “*reside* within the

City of Chicago'' and that they are not therefore subject to the vehicle license in question.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Financing of Central Police Station.

Chicago, March 10, 1922.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

We are in receipt of your letter of recent date concerning the means for securing a central police station located in or near the loop.

You state that such a station is under consideration, that the requirement for same is possible in the near future, but that the amount of money left in the Police Department Building Bond Fund is not sufficient for the purpose. It also appears that the sum of \$516,205.90 was appropriated from this fund by the Council for the purchase of sites and erection of buildings for police stations, thus making all or at least a part of that sum available for such a building if it can be used in connection with other money.

You go on to ask whether, assuming that you will be able to secure a party to furnish a site and erect a suitable building on plans approved by the city, the project can be financed partly out of the fund thus appropriated and the remainder out of money to be obtained in future years. You also ask some specific questions which we take up below serially and answer directly.

On the general proposition, we may say that there is no inherent difficulty in the way of financing a public improvement partly out of a bond fund and partly from other resources. The bonds issued by a municipality are not secured by mortgage or lien on any particular property—they pledge

the full credit of the city without regard to the particular improvement for which they were used. Consequently, it makes no difference that only a part of a building is financed therefrom. Some difficulties may arise on account of the city being so near the limit of its debt-incurring power, but otherwise it should be possible to find a way of accomplishing what you propose.

The section of the Cities and Villages Act which prohibits adding to the corporate expenditures beyond what is duly appropriated (Art. VII, Sec. 3) provides that "no expenditure for an improvement to be paid for out of the general fund of the corporation shall exceed in any one year the amount provided for such improvement in the annual appropriation bill."

We have frequently been called upon to express our views on questions arising under the said provision, and have consistently adhered to one interpretation.

This provision contemplates that where an improvement is paid for out of a bond issue or otherwise than out of the general corporate fund a contract may be made extending over a number of years and an agreement to pay from time to time beyond the current year may be included therein, such payments to be made out of the particular fund provided for it. The language used further seems to assume that it may be necessary to undertake improvements to be paid for out of the general corporate fund which cannot be finished during the current fiscal year. As to these, the clause quoted above limits the expenditure which can be made during the current year, but it does not prohibit the making of a contract which extends over into another year. It would be well in contracts of this kind, to have them so worded that expenditures for future years will have to depend on appropriations to be made therefor, but that is a detail which we need not consider at this time.

Passing now to the specific questions you asked, the first is as follows:

"1. Can the City of Chicago enter into a contract of purchase on installments of such a site and building

and pay on account thereof the fund remaining in the police bond issue?"

There is nothing in the way of the city making a purchase on time payments. The use of the money in the bond fund for this purpose is also lawful. The bonds having been voted for acquiring sites and buildings for police stations, such proposed use is within the purpose for which they were authorized. The mere fact that there is not enough money to complete the improvement will not prevent its use for the purpose for which it was intended so far as it will go. Farther on we show how this will affect the debt limitation.

Your second question is:

"2. Can such a contract be entered into covering a period of from 10 to 20 years?"

There being no constitutional or statutory restriction on the right of the city to acquire such an improvement by paying for it in installments, it follows that such plan can be developed as will enable the city to pay for it in any time not exceeding the constitutional limit of twenty years.

Your third question is:

"3. Can the city purchase such a building, pay on account the proceeds of the bond issue, and take title to the property subject to an outstanding bond issue thereon, payable in installments over a period of 10 to 20 years?"

One part of this question amounts to practically the same as your first question. That is to say, you ask whether the money from the bond issue can be applied, which question we have already answered.

The other part of the question contemplates that the city should assume the indebtedness evidenced by the mortgage bonds. This it cannot do, because when the city assumes the payment of the bonds it amounts to the same thing as issuing bonds, and the transaction would be an evasion of the statute which requires a vote of the people on the bond issue. Aside from this point there is no legal objection, and if the bonds are not assumed by the city even this objection will disappear, as will be seen from the following excerpt from one of the leading text-writers:

“If the city purchases water works or other valuable property subject to a mortgage, the amount secured by the mortgage is indebtedness of the city, even if it do not assume it, or become liable for it in any way. In order to keep the property purchased the city will have to pay the mortgage, and, if the amount due thereon exceeds the limit of the debt which the city is authorized to incur, the purchase is beyond its power and void.”

Dillon on Mun. Corp. (5th Ed.) Sec. 199.

Your fourth question is:

“4. Would the amount remaining due be held to be within the constitutional debt limitation of the city?”

This question is answered affirmatively in the excerpt which we have just quoted.

Your fifth question is:

“5. Could the city enter into a lease of such a building for a period of 10 or 20 years, the rental to be sufficient to amortize the investment and the property become that of the city, within the time limit, and, if such a lease were made, could the proceeds of the bond issue be applied toward the equipment of the building?”

The lease you suggest could be made, and it would be one way of avoiding the inclusion of the obligation in the debt limitation.

Our courts have held that the point on which the inclusion or exclusion of time payments from the debt limitation hinges is whether or not there has been created a present indebtedness or only an obligation to pay a debt if it is incurred from time to time.

E. St. Louis v. E. St. L. G. L. & C. Co., 98 Ill. 415,

City of Chicago v. Galpin, 183 Ill. 399.

Schnell v. City of Rock Island, 232 Ill. 89.

Cain v. City of Wyoming, 104 Ill. App. 538.

In such a case as is proposed, the obligation would not be a present indebtedness, the same author from whom we quoted above being our authority for this:

“A debt implies a right on the part of a creditor to enforce or require payment. Hence, if the municipality is not under an obligation to pay from its funds, taxes

or property, there can be no indebtedness, and *a contract or ordinance by which the municipality stipulates for an option to purchase property* on specified terms as it may find it prudent or advantageous for it to do so or not, *does not create any indebtedness*. It may decline to buy when the proper time comes, and until it determines to buy, no obligation or debt is assumed by it. On similar principles, a city may contract for land for a public purpose, and pay part of the price, reserving the right or option to cease paying at any time and to take title to such of the property as it has paid for, without creating debt within the meaning of the constitutional limitation. A contract for the purchase of land by a city, which provides that the city should be entitled to possession on making the first payment, and to a conveyance on payment within ten years of the balance of the purchase price with interest; that in the meantime the city should pay all taxes on the land; that upon default in any payment of purchase money, interest, or taxes, the vendors might foreclose the rights of the city in the land; and that there should be no corporate liability against the city in any manner or form by reason of the contract, has also been held to be in the nature of an optional right to the city, and to create no indebtedness."

Dillon on Mun. Corp. (5th Ed.) Sec. 200.

As to the second part of this last question, we do not see how the money in the bond fund could be used for purposes of equipment that are not strictly a part of the building. The bond issue of 1915, from which this fund arose, provided for the purpose of "acquiring the necessary sites and constructing buildings and remodeling existing buildings for the police department." The word "equipment" is somewhat elastic, and it may or may not be included in the purpose mentioned according to the sense in which it is used. If the money is to be devoted to permanent fixtures within such building these would properly come within the broader meaning of "construction," but there are many things that are required in the way of equipment that could not be included therein.

We believe we have covered all that you inquired about, although much might be said in regard to the details of

leases, contracts, etc., which we have not discussed, because it would be premature to go into that now.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Mechanics Lien Claims on Michigan Avenue
Bridge Contract.**

March 14, 1922.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

You forwarded to this office notices of mechanics lien claims against sub-contractors of the Great Lakes Dredge & Dock Co., relating to work done on the Michigan Avenue bridge, with a request for advice on same.

It appears that one of these claims, represented by two notices both under date of December 6, 1921, for the sums of \$12,088.00 and \$7,425.90, respectively, is the claim of W. F. Klemp against A. M. Ryckoff; the other is the claim of Mehring & Hanson Co. against Freeman, Sweet & Company, amounting to \$364.53.

The legal status of these two claims is identical. In both cases the work was done on the public improvement for a sub-contractor of the original contractor, the Great Lakes Dredge & Dock Co. The original contractor claims that there is no privity of contract between it and the claimant and that for this reason there should be no money which may be due from the city on the contract withheld from it.

We do not see how you can avoid holding the funds that are due to the original contractor to the extent that they are applicable to the work in question. There is a possibility that the liens do not apply to the particular vouchers you hold, but it would have to appear that they are for entirely different work before you could safely pay out the money on them.

The section of the Mechanics Lien Law applicable (Sec. 23) requires the public official notified of a lien of a sub-contractor "to withhold a sufficient amount to pay such claim" until it is admitted by the contractor, or adjusted by agreement of the parties, or there has been an adjudication in a court of competent jurisdiction. Under Section 21 the term "sub-contractor" is given so broad an interpretation that it clearly includes a sub-contractor of a sub-contractor. Hence, there is no point in the contention of the contractor to the effect that it is not liable because it has no contracts with the claimants.

The public official is given no discretion whatever in a case of this kind. Prior to 1919 the law was such that he could not even go into court and untangle a complication where there was a wrangle between contractors and sub-contractors, and great hardship frequently resulted therefrom. In 1919 we secured an amendment of this section which now makes it possible for the city or any of the aggrieved parties to go into court and have an adjudication under the Mechanics Lien Law the same as in the case of building on privately owned real estate. To this extent the contractor now can avail himself of the means for a quick adjudication, and in the cases presented such recourse may be had.

We are therefore of the opinion that you are bound to hold the money due to the extent of the claims asserted.

We return herewith the three claims submitted to us.

Yours truly,

LEON HORNSTEIN,

Approved: *Assistant Corporation Counsel.*

SAMUEL A. ETTELSON,

Corporation Counsel.

Rights of City in Seminary Avenue.

March 15, 1922.

MR. JOHN D. RILEY, Superintendent of Maps.

Dear Sir:

Pursuant to your request for an opinion as to the rights of the City of Chicago in Seminary avenue between Byron

street and Irving Park boulevard, also known as the street located between blocks three and four of Laffin, Smith and Byer's Subdivision of N. E. $\frac{1}{4}$ (except 1-28/100 acres in the N. E. corner) of Section 20, Township 40 North, Range 14 East of the Third Principal Meridian, which street is now occupied by the Chicago, Evanston and Lake Superior Railroad Company and has been so occupied by it for a number of years, I submit the following:

Without going into detail of the history of the subdivision, I conclude that the subdivision containing the street in question (and other streets not now considered) is proper in form and that there has been a valid dedication of all the streets in the said subdivision, including Seminary avenue, formerly known as Stella street, and further, that the fee of said street is vested in the City of Chicago, subject, however, to the right granted to the Chicago & Evanston Railroad Company to lay tracks, etc.

See page 633 of Hoover on Special Ordinances setting forth:

“An ordinance concerning the Chicago & Evanston Railroad Company. (Passed and approved October 3, 1881; accepted September 20, 1882).”

There have been subsequent amendments to the aforesaid ordinance but none of them have any effect on the street in question.

Section 1 of the ordinance cited above provides as follows:

“That permission and authority be and are hereby granted to the Chicago and Evanston Railroad Company, to lay down, maintain and operate a single railroad track or double tracks, with the necessary switches and turn-outs, through the town of Lake View, on a route commencing at a point to be selected by said company in Fullerton avenue, on the south line of the town, between the east line of Southport avenue and a point six hundred (600) feet east thereof, and running thence northeasterly and north to a point on the north boundary line of the town, three hundred and thirty (330) feet east of the center of Evanston avenue; and in the course of said route to run in the street which runs from Wrightwood avenue to Lincoln avenue on the line midway between

Southport avenue and Racine road (or avenue), and in Stella street from Grace street (or Ivanhoe street), its present southern end, to the street known as Sulzer street (or Armadale road), its present northern end; and to cross all streets and alleys in said route."

That part of Seminary avenue lying between Byron street and Irving Park boulevard, is contained in that part of the railroad route described in the aforesaid section of the ordinance, as,

"and in Stella street from Grace street (or Ivanhoe street), its present southern end, to the street known as Sulzer street (or Armadale road), its present northern end."

Byron street on the south and Irving Park boulevard on the north, are both north of Grace street and south of Montrose boulevard (formerly Sulzer street).

Therefore, the City of Chicago is vested in fee simple of the street in question, subject to the easement of the railroad company to lay either a single or double track. That part of the street not used by the railroad company for its single or double track (no side or team tracks are provided for in the ordinance or the amendments) is the property of the public and may be used by it for street purposes.

Yours truly,

HARRY F. CHAVERIAT,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Rights of City Police Officers on Boulevards.

March 15, 1922.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

In reply to your request for an opinion relative to the authority of the Chicago police to make arrests on Michigan and Jackson and other boulevards under the control of the South Park Commissioners, permit us to say:

The South Park Commissioners have plenary and exclusive authority over the boulevards and driveways transferred to its control, *so far as relates to the improvement, management and control of such boulevards and driveways*, but for other purposes these boulevards are within the jurisdictional limits of the City of Chicago.

Chicago City Railway v. South Park Commrs., 257 Ill. 602.

West Chicago Park Commrs. v. Chicago, 152 Ill. 392, 412.

It follows, therefore, that traffic regulations, and all other regulations concerning *the use of* such boulevards, fall within the province of the South Park Commissioners and are outside the jurisdiction of the City of Chicago.

We note from Captain Lavin's report, attached to your letter, that two defendants arrested for loitering on Michigan boulevard were discharged by a judge of the Municipal Court on the ground that the city was without jurisdiction in the matter. That was doubtless on the theory that an ordinance forbidding loitering on a street relates to the *use of such street*, in other words, is a *traffic regulation*, and, so far as the boulevards are concerned can be made and enforced only by the respective boards of park commissioners.

In other respects and for other purposes, however, the boulevards are still within the jurisdictional limits of the City of Chicago and its authority is unaffected. Thus, for instance, if a person who has committed a crime somewhere else in the city should be discovered by a city policeman on a boulevard, the officer would, in our opinion, have full authority to arrest him there. The same rule would, in our opinion, apply even to crimes committed on the boulevards, provided such crimes do not in any way relate to *the use of* such boulevard.

In *McCormick v. South Park Commissioners*, 150 Ill. 516, our Supreme Court, in discussing the power of the South Park Commissioners over Michigan avenue, said:

"By the plain language of the act, it seems clearly to have been the purpose of the Legislature to invest the South Park Commissioners with powers, generally, at

least, as full and exclusive, in regard to the park, as that conferred upon or possessed by the City Council of Chicago in respect to public squares and places in said city, each holding by the same kind of tenure, and in relation to the respective subjects matter referred to, the one clothed with powers identical in extent with those vested in the other. * * *

“Undoubtedly the authority of the Park Commissioners ceases at the line on either side of the street, and as to the character, height or dimensions of buildings, or of what material they shall be constructed, along the line of the street, they have no control. But so far as the street proper is concerned, they have the same powers as are vested in them of and concerning the parks, boulevards and driveways under their control, subject only to the reservations by the city in the ordinance above referred to.”

To the same effect is *C. & N. W. Ry. Co. v. West Chicago Park Commissioners*, 151 Ill. 204; and *Aldis v. South Park Commissioners*, 171 Ill. 424, where the court discussed the authority of the park commissioners over Jackson street.

In *West Chicago Park Commissioners v. Chicago*, 152 Ill. 392, the court said:

“We do not intend to intimate that, in the exercise of other municipal powers and functions, the city is excluded from jurisdiction over the park property, but only that, so far as relates to the laying out, improvement, management and control of the parks, the jurisdiction of the park board is exclusive.”

In *Chicago City Railway Co. v. South Park Commrs.*, 257 Ill. 602, the court said:

“Notwithstanding the broad and comprehensive language used in the park acts, we do not think it was intended by the Legislature to take from the city all jurisdiction and authority over intersections of public streets with boulevards and driveways, nor was it the intention of the Legislature to give the two municipalities the same or equal powers and authority over said intersections. * * * Their jurisdiction is concurrent but not co-equal. It is concurrent in the sense that each has authority and jurisdiction over the same territory, but such authority and jurisdiction are for wholly different purposes. * * *

“The language used in *West Chicago Park Comrs. v.*

City of Chicago, 152 Ill. 392, *McCormick v. South Park Comrs.*, 150 id. 516, and some other cases, that the power and authority of park commissioners over boulevards and driveways are plenary and exclusive of the City of Chicago, referred to and was intended to define the powers of the city and the park commissioners *with respect to the maintenance and improvement of boulevards and pleasure driveways as such*, and not as public streets of the city."

In *South Park Comrs. v. Chicago City Ry. Co.*, 286 Ill. 504, in discussing authority over street intersections, our Supreme Court said:

"The city and park commissioners have concurrent jurisdiction over the intersections of public streets with boulevards in the sense that each exercise authority in the same territory, but their jurisdiction is for different purposes."

Our conclusions from those and similar cases are as above set forth, namely, that the South Park Commissioners have jurisdiction of the boulevards in question for the purposes of improvement, management and control of the same, as such boulevards, but that for all other purposes they are under the jurisdiction of the City of Chicago; furthermore, that if a person commits a crime elsewhere in the city, he may be arrested therefor on a boulevard by the city police, and if he commits a crime on a boulevard, not connected with the use of such boulevard, he may likewise be arrested therefor by the city police.

Yours very truly,

CARL J. APPELL,

Approved: *Assistant Corporation Counsel.*

SAMUEL A. ETTELSON,
Corporation Counsel.

Voucher Drawn on Mayor's Contingent Fund.

March 15, 1922.

HON. GEORGE F. HARDING, Comptroller.

Dear Sir:

In reply to your request for an opinion relative to the legality of the proposed payments, out of the Mayor's Con-

tingent Fund—Account 22-S-1—of monthly vouchers for a \$10,000.00 salary to the Rev. J. B. Williamson, as law enforcement officer, permit us to say:

The appropriation of the contingent fund in question appears as follows in the Journal of the Proceedings of the City Council, February 10, 1922, page 1904:

“22-S-1.—Contingent fund for contingent and other expense for corporate purposes, not otherwise provided for, to be expended under the direction of the Mayor and City Comptroller—\$25,000.00.”

The appropriation, in an annual appropriation bill, of reasonable amount, as a “contingent fund,” to be expended, for public purposes, under the direction and at the discretion of an executive officer, has long been a common occurrence in the legislative history of this country, and has received the sanction of the courts.

In *Dunwoody v. United States*, 22 Ct. Cl. 269, the United States Court of Claims said:

“The adjectives, contingent, incidental and miscellaneous, as used in appropriation bills to qualify the word expenses, have a technical and well-understood meaning; it is usual for Congress to name the principal classes of expenditure which they authorize, such as clerk hire, fuel, light, postage, telegrams, etc., and then to make a small appropriation for the minor and unimportant disbursements incidental to any great business, which can not well be foreseen and which it would be useless to specify more accurately. For such disbursements a round sum is appropriated under the head of ‘contingent expenses,’ or ‘incidental expenses,’ or ‘miscellaneous expenses.’ ”

The court held, in that case, that such contingent fund could not be used to provide extra compensation for officers and employes whose salaries and compensation had already been fixed by the appropriation bill, but that where no salary or compensation had been otherwise appropriated for an officer or employe, there was no legal objection to paying the same out of such contingent fund. That, as we understand, is the situation here; no other appropriation has been made for any salary or compensation for the Rev. Mr. Williamson, and therefore it is proposed to pay the same out of said contingent fund.

Since such contingent funds are usually disbursed at the discretion of some executive officer, there are, in the nature of things, few limitations upon the purposes for which the same may be expended. Aside from the condition that such funds must not be used for purposes already covered by specific appropriation, the only limitation upon their use, practically, seems to be that they must be expended for some legitimate *public purpose* (in the case of a municipality, for a municipal purpose), and not for mere private use.

A., T. & S. F. Ry. Co. v. Topeka, 95 Kan. 747.

School District v. Western Tube Co., 80 Pac. 155.

That the employment of the Rev. Mr. Williamson as law enforcement officer is a legitimate corporate purpose, can not, in our opinion, be questioned. That the enforcement of the laws is a necessary and laudable public purpose, is recognized by all, and that there is still room for more law enforcement in this community, as well as in the country in general, and for more officers and agencies to make the same effective, we do not believe that anybody will seriously dispute.

We are of the opinion, therefore, that it was clearly within the discretion of the mayor to engage the Rev. Mr. Williamson as law enforcement officer, and that his salary may, under the direction of the mayor and the city comptroller, be paid out of the mayor's contingent fund.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Leases at Municipal Pier.

March 20, 1922.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

We are in receipt of your letter of recent date asking our opinion on the length of time for which leases can be

made at the Municipal Pier and other property of the city adjacent thereto.

Your inquiry is divided into three separate questions, in which you ask, first, how long a lease can the city enter into with a tenant for space on the Municipal Pier, second, how long can such a lease be entered into for the made land adjacent to the pier; third, how long a lease can be made for docking boats at the pier and adjoining property. At first blush it would appear that these questions must be answered separately, but, after giving the matter close consideration, we are of the opinion that all such leases as you mention in the three questions are governed by the provisions of the Harbor Act of 1913.

Section 1 of the act in question gives authority to the city to acquire, own, construct, maintain and operate all manner of harbor properties and harbor facilities. Sections 4, 5 and 6 give authority to reclaim and make use of submerged lands for the same purposes. The land adjacent to the pier is of this character, and therefore comes within the purview of the act.

The city has the right to lease portions of the pier and the land for a period not longer than twenty years, subject to certain limitations and the referendum which we mention below.

Except as to railroad facilities, at least one-third of the capacity can not be leased for a period of more than one year, and at least one-half of this one-third must be reserved for general public uses. Of the remaining two-thirds, not more than fifty per cent can be leased to one person or corporation. The section which contains these provisions reads as follows:

“§ 3. Every such city and village shall have the power to lease portions of any of the utilities mentioned in Section one of this act, for a period not longer than twenty (20) years on such terms and conditions as shall be prescribed by ordinance, and to fix and regulate the rates and charges for the use of such utilities, whether owned and operated by such city or village, or are operated by persons or corporations who are tenants of such city or village or are constructed, owned and operated

by any public or municipal corporation as hereinafter provided: *Provided, however*, that except as to railroad facilities at least one-third of the capacity of each such utility shall not be leased for a period to exceed one year and that at least one-half of said one-third shall at all times be reserved by such city or village for general public use, and that not to exceed fifty per cent in capacity of the remaining two-thirds capacity of each such utility shall be leased to any one person or corporation: *Provided, further, however*, that no leases authorized under this act shall contain conditions which shall admit of any unjust, undue or unreasonable preference or discrimination between lessees."

The referendum provision above referred to is contained in Section 11 of the same act. It provides that where a leasing for more than five years is proposed the ordinance providing for same shall not go into effect until ninety days after its passage, and if within that time a petition of five per cent of the registered voters requesting a referendum is filed the ordinance must be submitted to a vote of the people under the Public Policy Act, and in such case the ordinance goes into effect only if approved by a majority of the voters voting thereon.

The said section reads as follows:

"§ 11. No ordinance of any such city or village providing for the leasing of any portion of any harbor, wharf, dock, pier, quay wall, slip, levee, connection or other harbor utility acquired or constructed under the provisions of this act (and authorized by this act to be leased), for any period in excess of five years, shall go into effect until ninety days after the passage thereof, and if within such ninety days a petition shall be filed in the office of the city or village clerk of such city or village, signed by five per cent (5) of the registered voters of such city or village, as shown by the last preceding election held in such city or village, requesting that such ordinance be submitted to popular vote, it shall be the duty of said city or village clerk within three days after the filing in his office of such petition, to file the same, together with a copy of the ordinance, certified by said city or village clerk to be a true copy thereof, in the office of the officer or officers having jurisdiction over elections in such city or village, and it shall thereupon

be the duty of such election officer or officers to submit to the electors of such city or village, in the same manner as is provided by Section two of an act entitled, 'An Act providing for an expression of opinion by electors on questions of public policy at any general or special election,' approved May 11, 1901, at the first succeeding general or special election occurring more than ninety days thereafter or at a special election called by the City Council of such city or village for that purpose in the manner provided by Article IV of an act entitled, 'An Act to provide for the incorporation of cities and villages,' approved April 10, 1872, the question of whether or not such ordinance shall be approved and such ordinance shall not go into effect until it shall have been approved by a majority of the electors voting thereon at such general or special election: *Provided, however, that each ordinance providing for such leasing shall have a true copy of such proposed lease thereto attached.*"

The above applies to all the questions you asked. Incidentally, it will be noticed that, under Section 3, above quoted, there can be dockage of boats at the part of the pier reserved for general public use either by agreement for not more than a year or without any formal agreement under an ordinance establishing rates.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Action Concerning City Collector.

March 25, 1922.

HON. WILLIAM HALE THOMPSON, Mayor.

Dear Sir:

You forwarded to us a communication sent to you by the city comptroller, in which he notified you officially of a shortage of \$96,840.06 in the office of the city collector and stated that he had caused demand to be made on Mr. Age Zylstra,

city collector, for the said amount on March 3, 1922, but the same had not been paid.

In your own letter accompanying the above you asked to be informed as to the necessary procedure for you to follow in order to fully comply with the law and protect the interests of the city.

The comptroller's demand on the collector and his notice to you are all in conformity with Section 40 of The Chicago Code of 1911, which we quote in full below. This section of the Code contemplates summary removal of the city collector when such notice is given to you of demand having been made and of refusal or neglect to comply therewith.

However, it would probably be regarded as sufficient to satisfy the requirements of this ordinance if you took such action after giving the collector an opportunity to show cause why he should not be removed. If he can show that there was no shortage, or that the same has been made good, or that it will be made good within a short time by himself or his sureties it will be within your discretion to defer such action for awhile even though the law contemplates the utmost promptness.

To this end we have prepared a form of notice which we submit herewith, in which five days is given to the collector to show cause why he should not be removed as by law required.

In order that you may have before you the salient points in the law relating to such a situation, we give below a short statement covering same and a few excerpts from the statutes and ordinances which will show what the procedure in such cases should be.

The specific duties of the collector as distinguished from those general duties of all officers having to do with the handling of money, are set forth in the Cities and Villages Act, Article VII, Sections 13 to 16 inclusive and Sections 20 to 22 inclusive. (See Hurd's Rev. St., 1919, pp. 341-2.)

Section 13 of the above requires the following of the collector, among other things:

“He shall weekly, and oftener if required by the council, pay over to the treasurer all moneys collected

by him from any source whatever, taking such treasurer's receipt therefor, which receipt he shall immediately file with the city clerk; but the city clerk shall, at the time, or on demand, give such tax collector a copy of any such receipt so filed."

Section 15 reads as follows:

"The collector is hereby expressly prohibited from keeping the moneys of the city in his hands, or in the hands of any person or corporation, to his use, beyond the time which may be prescribed for the payment of the same to the treasurer, and any violation of this provision will subject him to immediate removal from office."

Section 16 requires the collector to pay over all money collected by him to the treasurer every two weeks "or oftener if the City Council so directs."

From the above it will appear that the statutory provision contained in Section 15 of itself could require the removal of the collector even if there were no ordinance on the subject. But the ordinances go farther than this. Section 80 of the Code, passed in pursuance of statutory authority, requires daily payment of all moneys collected to the treasurer, and Section 40 of the Code, to which reference was made above, reads as follows:

"40. POWER TO ENFORCE STATEMENTS.) It shall be the duty of the comptroller, whenever any officer shall refuse or neglect to make such statement, or to adjust his accounts, whenever required so to do by the comptroller, or to pay over to the proper officer any moneys in his possession belonging to the city, to cause a notice in writing to be served upon such officer and his sureties, demanding a settlement of his accounts forthwith, and in case of the refusal or neglect of such officer, for a period of five days after the service of such notice, to make such settlement and pay over such moneys, *said comptroller shall report such officer to the mayor, who shall immediately remove him or cause him to be removed from office*; and proceedings for the recovery of any moneys due the city shall be at once instituted against such officer and his sureties."

Thus it will appear that the comptroller was required by law to make the demand in writing and to report to you

after waiting five days for payment. Such payment having been refused, the requirements for removal and for institution of suit against the collector and his sureties are mandatory.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Interpretation of Pool Room Ordinance.

March 25, 1922.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

Replying to your request for an opinion relative to the interpretation of Section 13 of the Pool Room ordinance, we beg to state:

The section in question reads as follows:

“*Section 13. Screens and Partitions Prohibited.* No billiard room operating under the provisions of this ordinance shall allow or permit any screens, curtains, blinds, partitions or other obstructions to be placed between the front windows and back or rear wall of such billiard room. A clear view of the entire interior from the front street to the rear of such room must be maintained at all times. No partitions forming rooms, stalls, or other enclosures where the public congregate, shall be permitted. This provision, however, shall not be construed to preclude the maintenance of wash rooms and toilet rooms for proper purposes, or the maintenance of closets for storing purposes exclusively.”

As to pool rooms located on the ground floor of a building, the ordinance is plain, but difficulty arises in trying to apply it literally to pool rooms located on second or third floors or in basements. Apparently the City Council overlooked the possibility of such locations when they framed the ordinance. As to such locations, three interpretations of this section of the ordinance are possible:

1. That it does not apply to them at all; or

2. That it was the intention of the City Council to prohibit pool rooms to be located anywhere except on the ground floor of a building; or

3. That they must be so located that a clear view from the front street may at all times be had of such room, either from the surface of the street, or from an elevation on a level with the floor of such room, for instance an elevated structure in the street, or a building on the opposite side of such street.

We are of the opinion that the courts would be most likely to adopt the last mentioned interpretation. We think, however, that the ordinance is very obscurely worded, and that it needs to be amended in several respects in order to clearly express the meaning of the City Council.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Power to Establish Building Lines.

March 28, 1922.

HON. CHARLES BOSTROM, Chairman, Chicago Zoning Commission.

Dear Sir:

We have before us your request for an opinion on whether the Zoning Commission has the power, under the enabling act, to create building lines.

This question, opens up a large field of inquiry which can be approached from two different angles.

If it were the desire of the commission to avoid anything in its proposed zoning ordinance which is subject to doubt, we could very quickly dispose of the matter by showing that permanent building lines are not looked upon with favor by our Supreme Court, and then advise against a departure from the established practice of having such matters taken care of by private contract, as in the case of a restriction in the deed.

We do not understand, however, that you are looking for excess of caution on our part, but would rather have us indicate to you how far you can go without running afoul of precedents so well established that we can not hope to overturn them. That the law with respect to the whole subject of zoning and city planning is undergoing development, is recognized by all authorities and specifically pointed out by able text writers. (See Dillon on Mun. Corp., 5th Ed., Sec. 695.)

The very nature of the work the commission is engaged in presupposes an extreme exercise, if not an enlargement, of the police power relating to the use and enjoyment of real estate. If the commission is to accomplish anything worth while it will draft an ordinance that will tax the abilities of the lawyers who will be called upon to defend it in the face of decisions that are not generally regarded as friendly, and it will undoubtedly be something of a task to present the matter in such a light that our courts will go as far as those in some states that have taken advanced ground on these questions.

Since this situation confronts us in any event, we will assume that you expect us to take quite as radical a position on this point as on other questions involved in the general work of zoning, and we will endeavor to point out the limit to which the commission can go in this respect.

The present inquiry has nothing to do with building lines established by contract. Different laws and different principles are applicable in the case of building lines created by a restriction in the deed, special covenants, etc., as well as in the case of rights and easements acquired by prescription or usage, from the laws and principles that apply in the case of an ordinance founded on the police powers.

In the case of restrictions by deed or contract, our Supreme Court has repeatedly gone on record as not favoring a perpetual or indefinite limitation, but if such has been created by the voluntary action of the parties, clearly expressed in language which admits of no doubt, the same will be enforced

—whereas, if the language is doubtful the doubt will be resolved against the restrictions.

Eckhart v. Irons, 128 Ill. 568.

Hays v. St. Paul M. E. Church, 196 Ill. 633.

Loomis v. Collins, 272 Ill. 221.

Dick v. Goldberg, 295 Ill. 86.

In the first of the cases cited above, the court said:

“Restrictions on the use of property held in fee are not favored, yet where the intent of the parties is clearly manifested in the creation of restrictions or limitations upon the use of the grantee, for the benefit of the grantor, his heirs or assigns, a court of equity will enforce the same.”

This doctrine was somewhat enlarged, so as to include a restriction where the public and the owners of other property in the same subdivision are the ones benefited instead of the grantor. Thus, it was held in *Simpson v. Mikkelsen*, 196 Ill. 575, that the designation of a building line upon a plat creates an easement for the benefit of the public, and especially for the benefit of the property abutting upon the street, and it is not necessary for the plat to mention or set forth the persons to be benefited by the reservation. In that case the court, among other things, said:

“There can be no question, from an examination of the plat, that the purpose of this language and the broken line was to reserve a space fifty feet in width off the front end of the lots abutting upon Humboldt boulevard upon which no buildings were to be erected. * * * The reservation is an easement for the benefit of the public, and especially all the property abutting upon the street in this subdivision. The space between the building and the street belongs absolutely to the owner of the lot, subject to this easement, and the owner of this and the other lots in the subdivision are guaranteed whatever benefits may result from an unobstructed view across the entire reservation. * * *

“* * * As we have seen, the building line being clearly designated upon the plat, and this reservation or easement being for the benefit of the public generally, including the adjoining owners, when the dedication of the boulevard was accepted by the public the building restriction appurtenant thereto was also accepted.”

The extent to which the courts may go in holding against such a restriction prohibiting the erection of any building "except a single detached dwelling house to cost not less than \$10,000" was construed as permitting the construction of a flat or apartment building.

Hutchinson v. Ulrich, 145 Ill. 336.

Voorhees v. Blum, 274 Ill. 319.

On the other hand, where such a flat-dwelling restriction was expressed in unmistakable language, it was interpreted as it was intended by the parties.

Dick v. Goldberg, 295 Ill. 86.

While the law is thus clearly fixed so far as contractual building lines are concerned, there is the utmost doubt as to what can be done under the police powers.

The Zoning Act appears to confer the necessary power to establish a building line. Such an interpretation can be placed on the following grant of power:

"* * * to regulate and limit the intensity of the use of lot areas, and to regulate and determine the area of open spaces, within and surrounding such buildings,
* * *."

It is possible to so construe this language that it may be understood as referring only to the extent of open spaces on lots rather than the position of them, especially with reference to the front or street line of such lot. Undoubtedly the courts would adopt the latter interpretation if they were to hold that the former construction would render the clause unconstitutional. We are of the opinion, however, that there is excellent authority for holding that such a construction, if applied in a case where the police power has been reasonably exercised, would not necessarily render the clause unconstitutional.

The case of *City of St. Louis v. Hill*, 116 Mo. 527, is the one most often cited in the reports as establishing the principle that the creation of a building line by ordinance or legislative enactment operates to impair the use of ownership of land and that it therefore amounts to a taking of property

without compensation. There are many other decisions to the same effect.

However, it would seem from some of the later decisions that the view expressed in the Hill case and in similar cases is now somewhat modified and is no longer the obstacle to city planning that it was some time ago. Thus, the Connecticut Supreme Court of Errors overruled two cases holding similarly (*Northrop v. Waterbury*, 81 Conn. 309; *Benedict v. Pettes*, 85 Conn. 537), in the recent case of *Windsor v. Whitney*, 95 Conn. 357, from which we quote at some length farther on. In fact, there is a decided trend away from a rigid application of the principle above set forth, and this tendency is so marked that it is hard to reconcile the decisions. The Missouri court, among others, appears to have altered its position.

In the more recent case of *City of St. Louis v. Handlan*, 242 Mo. 88, the court rendered an opinion on the validity of an ordinance passed under a charter which said the municipality assembly, in creating boulevards, "may establish a building line to which all buildings, fences, or other structures thereon shall conform." This provision is almost identical with the one passed on adversely in *St. Louis v. Hill*, above mentioned. The constitutionality of this provision does not appear to have been attacked, and the court in holding the ordinance invalid did so on the ground that it discriminated in favor of certain property holders and therefore violated this charter provision. But it is significant that neither the briefs in the case as reported, nor the opinion of the court, treated the provision in question otherwise than as constitutional and valid.

In the annotation which treats of the constitutionality of city planning statutes and ordinances, in 12 A. L. R. 679, the cases on this point are collected nearly down to date. The great preponderance or weight of authority still remains on the side which holds to the doctrine that statutes providing for building lines are not sustainable under the police power. But we find that as against the positive and inflexible application of this doctrine there is not only the case of *Windsor v.*

Whitney, but a number of other well-considered cases which sanction at least a limited exercise of the police power in this direction.

In the case of *Re Clinton Ave.*, 57 App. Div. 166, the New York Supreme Court held that the establishment of a building line was proper in case compensation was given therefor. While this really applied the principle of eminent domain, it is important in view of the fact that the question of whether this was a public purpose was raised, and the court decided that such a reservation may be made in order to afford "ample space for the access of light and air" as well as to beautify and adorn the street. We believe this leans very strongly towards our position.

Again, in *Hallsell v. Ferguson* (Tex.), 202 S. W. 317, it was held to be within the police power to require buildings to conform to the frontage on residence streets, the court saying that such an ordinance appeared reasonable and promoted the general convenience and public welfare and that it was not subject to attack on constitutional grounds.

In the case of *Windsor v. Whitney*, 95 Conn. 357, it was held that where a party undertook to subdivide his land he could be compelled to establish a building line under the police power. The court said:

"The commission does not impose upon the defendants the burden of laying out any street or designating any building line. It leaves it optional with them whether they shall open the street or designate the building line. This does not physically take the land, but it regulates its use, and hence it deprives the owner of a part of his dominion over his land. The owner may not lay out streets through his land where he chooses, and of the width he chooses. Nor may he establish the building lines where he wills. There is no provision in the act for compensation for such interference with the owners' dominion.

"Unless this regulation can be supported as a legitimate exercise of the police power, the act must fall. A town commission plan such as this act contemplates is distinctly for the public welfare. Its theory is to lay out streets when and where the public need them, and of adequate width to meet the requirements of the com-

munity and of transportation. In such a plan each street will be properly related to every other street. Building lines will be established where the demands of the public require. Adequate space for light and air will be given. Such a plan is wise provision for the future. It betters the health and safety of the community; it betters the transportation facilities; and it adds to the appearance and wholesomeness of the place, and as a consequence it reacts upon the morals and spiritual power of the people who live under such surroundings. * * *

"The act does not prohibit the owners from the use of any of their land, except in case they purpose opening streets and selling lots thereon, in which case they lose the use of so much of their land as is contained in the street limits and is in excess of what they purposed laying out as a street, and of so much of the land as the building line prevents their use of for building purposes. If the prohibition of the act deprived an owner of the use of any part of his land, and this was not needed for the public health, or safety, or welfare, there would be a plain violation of the constitutional provision. But where it is so needed,—and that is the case before us,—the subjection to the police power of all property gives the state the right to forbid the use of property in the way desired, save under reasonable conditions, promoting the public welfare.

"The state may regulate the use of property to the point of forbidding thereon certain businesses in themselves lawful, as in the case of slaughter houses and cemeteries. It may regulate building in the interest of health and fire safety. It may limit the height of buildings in certain districts, or the character of the buildings in these districts. It may prevent the erection of billboards, or limit their height. In short, it may regulate any business or the use of any property in the interest of the public health, safety, or welfare, provided this be done reasonably. To that extent the public interest is supreme, and the private interest must yield."

It would seem, therefore, that some progress may be made along the lines we suggest below in case the proposed building line provisions are put in sections and clauses that are severable from the other provisions of the zoning ordinance, so that an adverse decision will not affect the validity of the remainder. Care should also be taken to avoid the pit-

fall of discrimination. The recent case of *People ex rel. Roos v. Kaul*, 302 Ill. 317, in which the Supreme Court held that an ordinance prohibiting the use and construction of certain buildings in the proximity of a hospital, church or school was invalid, turned largely on the point that business would be kept out of territory where a similar business already exists.

We suggest that if a building line restriction in certain localities is deemed desirable by the Zoning Commission, it should be limited to the following places:

1. Where a new subdivision is platted in a residential area.
2. To such blocks as are platted but not yet occupied by houses where it is proposed to make the district residential.
3. To residential blocks which already have all the buildings set back.
4. To such residential blocks as have only a small amount of frontage without a set-back for buildings, in which event such allowances should be made to lots adjoining the protruding building as will avoid discrimination.

We are of the opinion that if such building lines are established, with a means for relaxation that will overcome any case of injustice or extreme hardship, the desired result will be accomplished and the provision will be found both feasible and valid.

Yours truly,

LEON HORNSTEIN,

Approved: Assistant Corporation Counsel.

SAMUEL A. ETTELSON,

Corporation Counsel.

Extension of Street Railway Lines.

March 29, 1922.

TO THE HONORABLE, THE CITY COUNCIL OF
THE CITY OF CHICAGO.

Gentlemen:

At your meeting on March 22, 1922 (Journal of the Proceedings of that date, pages 2316 and 2317), Alderman

Ulysses S. Schwartz, as chairman of the Committee on Local Transportation, introduced an ordinance known as pamphlet No. 1213, which, in substance, provided for an extension by the Chicago Railways Company of its lines of street railway upon Milwaukee avenue from the Chicago & Northwestern tracks to the city limits; such extension to be made pursuant to and in accordance with the provisions of an ordinance entitled "An ordinance requiring and authorizing the Chicago Railways Company to construct, maintain and operate certain extensions and additions to its lines of street railway," passed by the City Council on October 10, 1910 (Journal of the Proceedings of that date, page 1502, *et seq.*) and a subsequent ordinance passed by the City Council on June 22, 1914. (Journal of the Proceedings of that date, page 909 *et seq.*) This last mentioned ordinance provided for the construction of the extension "in accordance with the ordinance of October 10, 1910, appearing in the printed journal of the council proceedings of that date, at pages 1502 to 1511 inclusive;" and hence, for the purpose of this communication is immaterial.

At the aforesaid meeting on March 22, 1922, the City Council requested of the corporation counsel his opinion as to the advisability of passing the ordinance introduced by Alderman Schwartz at such meeting, in view of certain pending litigation affecting the rights of the street railway companies in the streets.

It is the opinion of the corporation counsel that the passage of such ordinance would be an unconditional surrender by the city to the Chicago Surface Lines, in the controversies now pending between them, resulting in incalculable damage to the people of the city.

The ordinance of October 10, 1910, provides that the required extensions shall be made under the contract ordinance passed February 11, 1907, entitled, "An ordinance authorizing the Chicago Railways Company to construct, maintain and operate a system of street railways in the streets and public ways of the City of Chicago," which contract ordinance was approved by the people on referendum vote; and was accepted by the Chicago Railways Company on January 29,

1908. This is one of the ordinances commonly known as the settlement ordinances.

Since January 1, 1914, the Chicago Railways Company, the Chicago City Railway Company, the Calumet and South Chicago Railway Company and the Southern Street Railway Company have been operating under the designation of the Chicago Surface Lines. Each of the three last named companies also has a contract with the city in the form of an ordinance substantially in the same terms as the contract ordinance of February 11, 1907, with the Chicago Railways Company.

Heretofore the city has taken the position that the street railway companies have broken and, in essential particulars, have repudiated their contracts with the city as evidenced by said contract ordinances; that because of such breach and repudiation by the companies the city had the right to abrogate and cancel said contracts; and that, on the 4th day of February, 1921, the City Council approved the action of the mayor and corporation counsel on behalf of the city in abrogating and cancelling the same; and itself took action to the same end. (Council Proceedings of February 4, 1921.)

At that time, the specific question of requiring the companies to make extensions under the provisions of the contract ordinances was considered and the conclusion reached that the consequence of doing so would be an approval of and acquiescence in the breach and repudiation of the contracts by the companies and a waiver by the city of its abrogation and cancellation thereof because of such breach and repudiation by the companies.

It was then determined that the proper way to compel the companies to make needed extensions was by applications, independent of the contracts with the companies, to the then Public Utilities Commission, the jurisdiction of which has since been taken over by the Illinois Commerce Commission; and the corporation counsel was authorized and directed to make such applications. (Journal of the Council Proceedings, February 4, 1921, at pages 1758 and 1759.)

This procedure was afterwards successfully followed in the case of the extension of the street railway of the Chicago

Railways Company at the Municipal Pier in connection with the Pageant of Progress; and the proper course to pursue in the present case, in my opinion, is to make an application to the Illinois Commerce Commission, pursuant to said ordinance passed on February 4, 1921, for an order upon the Chicago Railways Company to make the extension contemplated by the ordinance introduced on March 22, 1922.

If the City Council should pass the ordinance introduced on March 22, 1922, thereby ordering and requiring the Chicago Railways Company to make the extension under the settlement ordinance of February 11, 1907, the city would recognize the contract evidenced by said ordinance as still in force and effect, and would waive its abrogation and cancellation of such contract and also its right to abrogate and cancel the same on account of the breach and repudiation thereof in essential particulars by the companies and, further, would approve and acquiesce in such breach and repudiation by the companies.

In *Seattle, Renton and Southern Railway Company v. City of Seattle*, 216 Fed. 694, the court recognized and acted upon the rule of law that, when a municipal corporation, after knowledge of an act or omission constituting a ground of forfeiture of a franchise granted, does any act which unequivocally recognizes the franchise as still existing and in force, a waiver of the forfeiture will be inferred.

The court said at page 701:

“The city can not derive any benefits from the franchise and yet rescind the ordinance which gives it life. The franchise must be nullified *in toto* or not at all.”

This rule of law is well settled and of wide application.

Nothing in this communication contained should be construed as intimating in any way that any alderman is knowingly cooperating with or aiding the street railway companies in their attempt to take advantage of the city and its people. Nevertheless, it is a fact, doubtless unknown to the aldermen who have supported the ordinance introduced on March 22, 1922, that nothing would be more pleasing to the street railway companies than to have the City Council pass such ordinance. For many months the representatives of the compa-

nies have been strenuously endeavoring to maneuver the city into a position where it will approve of and acquiesce in the action of the companies in breaking and repudiating such contracts and recognize the same as still in force and effect, notwithstanding such breach and repudiation by the companies. Their reason for doing so is obvious. Their misconduct and bad faith with the people give them no reason to hope that they can deceive the people again into giving them the right to maintain and operate street railways in the streets and public ways of Chicago; and it is therefore obvious that they are now trying to create a situation whereby they can later unload their properties upon the public at the grossly excessive purchase price built up under the contract ordinances, which the passage of the pending ordinance would validate. This padded purchase price now aggregates over \$160,000,000; but as testified by a representative of the companies, even in 1917 included items aggregating \$85,000,000 to \$90,000,000 which are represented by no property at all.

The companies claim that, in negotiating with the city for a sale of their properties, this grossly excessive and arbitrary purchase price must be accepted as the value of their properties. This padded price, if paid by any purchaser, would be almost certainly a ruinous investment from the standpoint of good business. A vote for the pending ordinance would tend, therefore, to vote many millions of dollars of value into this watered valuation; and would make it well nigh impossible for the people to acquire the street railway properties.

It is true that the Transportation District, under Mayor Thompson's plan of people's ownership and operation, would have the power and the financial ability to condemn the properties, if the companies should not agree to a reasonable price. Such Transportation District would be an independent governmental agency, not bound by such grossly excessive purchase price. It would not be required to pay the padded purchase price before it could operate upon the streets, and would not be subject to the joker in the Mueller bill and the terms of the settlement ordinances by which an attempt was

made to give the companies practically perpetual rights in the streets, although their contracts, on their face, professed to limit their rights to February 1, 1927.

Still if the Transportation District should undertake to condemn the existing street railways, the companies might attempt to base the value of their properties on the padded purchase price built up under the terms of the contract ordinances, especially if they could show that their contracts with the city were still in force and effect; and the court or jury might consider that claim as an element of value and make a large allowance on that account, if it could be shown that the city had abandoned its contention that the contract ordinances have been abrogated and cancelled.

There are other important advantages to the city in adhering to its policy of abrogation and cancellation of the contracts with the companies which we deem it unnecessary to detail at this time, and which would be greatly injured if not entirely defeated by the passage of the pending ordinance.

Thus, the city and its people have nothing to gain and everything to lose by the passage of the ordinance under consideration, while the street railway companies have everything to gain and nothing to lose by its passage.

Therefore, we advise against its passage.

It must be borne in mind that the Chicago Surface Lines, including the Chicago Railways Company, have persistently refused to keep and live up to their contracts with the city, when it has served their purpose to do so; and, hence, there is no assurance that the Chicago Railways Company would make the extension under consideration, even if the ordinance introduced on March 22, 1922, were passed. Our experience teaches us that, in such case, the company would make the extension only if it concluded that by doing so it would gain a great advantage over the city and its people. Under these circumstances, the passage of such ordinance would operate only as a supine and gratuitous surrender of important legal rights of the city and of its people.

We submit herewith a draft of an order which we suggest that the City Council pass. Upon its passage we will

make an application to the Illinois Commerce Commission for an order requiring the Chicago Railways Company to make this extension; and we will do everything in our power to have this application granted.

Respectfully submitted,
 CHESTER E. CLEVELAND,
Special Assistant Corporation Counsel.

Approved:
 SAMUEL A. ETTELSON,
Corporation Counsel.

Validity of Ordinance Concerning Heating of Buildings.

March 30, 1922.

HON. JOHN P. GARNER, Chairman Committee on Public Health.

Dear Sir:

We are in receipt of a letter from the city clerk in which he asks us to advise you as to the conclusions of the Law Department in reference to the proposed amendments to the heating ordinance now pending before the City Council.

It is stated in the said letter that at the meeting of your committee on March 24th there were certain amendments presented by the Chicago Real Estate Board which were tentatively adopted by the committee, subject to an opinion from the Law Department that the amendments will in no wise affect the validity or interfere with the enforcement of the proposed ordinance.

The amendments all relate to heating in tenement houses, and the section relating to factories and workshops is not affected except as the penalty clause amendment may reduce the number of prosecutions.

The first amendment suggested is to the effect that the duty to furnish heat shall only exist "after written notice of default sent by the Department of Health by registered mail." Such a provision is extremely vague as not indicating what the default is, and would endanger the ordinance. Besides, unless it is intended that a prosecution may be insti-

tuted for the offense contained in the written notice it is rather paradoxical, as contemplating that there shall be no violation until complaint of a violation has been made and notice served thereon.

It was probably the intention that there should be no prosecution until notice had been given by the Department of Health and an opportunity had been given to correct the fault. The long amendment proposed for the end of Section 1 indicates that this is the purpose in view, although the latter has the same defect of form, in that it says that failure to furnish the heat shall not constitute an offense "without notice of failure to furnish heat shall be mailed to the owner or agent prior to bringing suit." There would, of course, be no object in the notice if suit could be instituted thereon after such notice and without a continuation of the offense. Hence, we assume that our interpretation is what is intended, and we have so worded the ordinance in the re-draft of Section 1 which we present herewith.

The proposed amendment to Section 1 whereby there would be liability only in case of the average temperature throughout the apartment or house being too low (which we presume to be the intent), seems inconsistent with the rest of the section. The ordinance is designed to compel the furnishing of heat to rooms and apartments in a building, not to apartments and houses, hence the average temperature in the whole tenement house, which might include the boiler room, would not serve the purpose for which it was intended. The amendment which proposes to take the temperature in two separate apartments is open to the same objection. If it is the intention to make the average for an apartment the basis for liability that would conform to the purpose of the ordinance. In our redraft of Section 1 we have therefore provided for liability based on the average temperature for the apartment, and for two separate readings in such apartment, also for two separate readings in a room where the apartment consists of a single room.

The other amendment to Section 1, which limits the period during which heat must be furnished to the time extending from October 1st to May 1st, is merely a modification of

the original provision that does not affect the validity of the ordinance.

We call attention to a provision in Section 3 of the ordinance which has not been amended that casts some doubt on the validity of the ordinance. That is the provision which limits conviction to the cases where the evidence is furnished only by the Department of Health. This in substance amounts to saying that the Department of Health may or may not prosecute as it sees fit. While the probability is that prosecutions will be instituted only when they are proper in the discretion of the commissioner of health or his duly accredited representatives, nevertheless an ordinance which limits prosecution to only such case would probably be regarded by the courts as an unlawful delegation of power.

The proposed amendment of Section 3 limiting prosecutions to one for each day on any one building does not seem obnoxious from the standpoint of validity.

The other amendment proposed for Section 3, by which it is stated that the ordinance "shall not be deemed to create any civil liability, rights or remedies as between lessors and lessees," in our opinion is nugatory. If it is within the police powers of the city to enforce such an ordinance, the party violating it will be liable for any damage that may accrue to a tenant or to any one else from such violation, regardless of anything that is said about civil damages in the ordinance itself. If, on the other hand, the ordinance is a limitation on the right of private contract, such liability will be held as not in existence. In any event, the attempt to avoid liability as between lessors and lessees and not as to others is a discriminatory provision which might render the ordinance void.

We have re-drafted Sections 1 and 3 so as to overcome the objections pointed out above and submit same herewith.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Laboratory License.

March 31, 1922.

AMERICAN BAKERS ASSOCIATION, 1135 Fullerton Avenue, Chicago, Illinois.

Gentlemen:

We have your letter of March 23, 1922, above subject, in which you claim that your establishment falls under Class 3 of the ordinance and that you are therefore exempt from obtaining a license.

Section 1212b of The Chicago Code of 1911 as passed by the City Council on April 7, 1920 (page 2501 of the Journal of the Proceedings of the City Council of said date), reads as follows:

“1212b. LICENSE REQUIRED.) No person, firm or corporation shall establish, maintain or operate any laboratory, as defined in Section 1212a, for conducting examinations, analyses, experiments, determinations, or preparing therapeutic products, for a fee, without first having obtained a license as hereinafter provided.

“For the purpose of this section laboratories are classified in three classes, and the annual license fee for each class shall be fixed as follows:

“Class 1. Laboratories operating and conducting examinations, analyses, experiments, determinations, or preparing therapeutic products in the City of Chicago. The license fee for this class shall be five dollars (\$5.00) for each person employed in such laboratory.

“Class II. An agent or agency soliciting for examinations, analyses, experiments, determinations, or preparing therapeutic products, as enumerated in Section 1212a, which are conducted in a laboratory located outside of the city, and where such business does not require more than two (2) clerks to handle the business. The license fee for this class shall be twenty-five dollars (\$25.00), and an additional fee of ten dollars (\$10.00) for each additional clerk employed in such establishment.

“Class III. It is provided, however, that any person, firm or corporation conducting a laboratory, as aforesaid, which does not directly serve the public for pay and which is maintained as a part of his or their

principal industry or profession, shall be exempt from the payment of the aforesaid license fee.

“It is further provided, however, that any person, firm or corporation conducting examinations, analyses, experiments, determinations, or preparing therapeutic products, all of which are without charge, shall be exempt from the payment of the aforesaid license fee.

“It is also further provided, however, that all municipal, county, state and federal institutions conducting examinations, analyses, experiments, determinations, or preparing therapeutic products, shall be exempt from the payment of the aforesaid license fee.

“Every such laboratory license shall expire on the thirtieth day of April following the date of its issue.”

In your letter you stated that the work in the Analytical Laboratory is done at a nominal charge to the members and others wishing to avail themselves of this service. This being the case it is our opinion that your establishment is liable for a license under Class I of the above mentioned ordinance and we advise you to apply immediately to the city collector for a license for said establishment.

Yours respectfully,

FRANK W. DERBY,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Coffee House License.

March 31, 1922.

HON. A. J. CERMAK, Chairman Revenue Commission.

Dear Sir:

We have your letter of February 21, 1922, in which you state that the Planters Hotel are operating a restaurant and a coffee shop, one on the first floor and the other on the second floor in the same building. You asked us to advise you whether they should take out one or two licenses.

Section 1 of an ordinance licensing and regulating coffee houses or ordinances passed by the City Council on July 21, 1919, as amended on December 28, 1921, reads as follows:

“SECTION 1. No person, firm or corporation shall carry on, engage in or conduct the business of keeping what is generally known as a coffee house or ordinary, which is hereby defined as a house, room or place where coffee as a beverage and other refreshments are sold, served or supplied to the public to be consumed on the premises, without first obtaining a license as hereinafter provided.”

In the case of *State v. Brown*, 104 Northwestern 1112, the court defined the term “place” as follows:

“ ‘Place’ is a comprehensive term, and may consist of one or more rooms in a building, or it may be an entire building, or more than one building within the same place used together for the convenient conduct of a prohibited purpose. A place kept as a nuisance, in violation of Section 7605, Rev. Codes, 1899, may consist of one or more buildings, where they are both used for the unlawful purpose as parts of the same premises.”

In the dramshop ordinance the following language occurred:

“No license shall be issued for the keeping of any saloon or dramshop, where more than one room is to be used, unless all the rooms which it is intended to use are directly connected, adjacent and contiguous with and to each other, and upon the same floor.”

This provision does not occur in the coffee house license ordinance and it is therefore our opinion that it was the intention of the City Council that the word “place” should be given its generally accepted and comprehensive meaning. Accordingly, we advise you that one coffee house license should be issued to the Hotel Planters to cover both the rooms on the first and second floors.

Yours respectfully,

FRANK W. DERBY,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Roosevelt Road Viaduct Appropriation.

April 3, 1922.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

We are advised that a question has arisen as to whether the City Council can reimburse the general corporate fund for moneys drawn therefrom for the completion of the Roosevelt Road viaduct under the recent appropriation for that purpose.

The form in which the appropriation was made is an appropriation from miscellaneous receipts "to be reimbursed from the proceeds of a bond issue for bridge and viaduct construction purposes, if the same is authorized and approved." (Council Journal, p. 2170.)

The form quoted above is the usual form substantially as it has been in vogue for many years. It is not entirely acceptable, and the writer took occasion to point out wherein it was defective when this matter was up for consideration; yet it has not been attacked and it has served for the purpose intended.

The objection to the form is that it does not express exactly what is intended. The purpose of making the appropriation in this way is to have an alternative appropriation, so that if the proposed bond issue is not approved the money can be drawn from the general corporate fund. Otherwise it would be proper to appropriate directly out of the proposed bond issue. Hence, it would have been better to have stated this in the ordinance as an alternative appropriation rather than as a reimbursing proposition.

The point was raised by the writer that if the proposed bond issue was actually intended for the reimbursement of a fund from which the cost of an improvement had been defrayed, that would cast doubt on the validity of the bonds as placing a debt on future taxpayers for an improvement that was already paid for before the bonds were issued.

But, while the form of the appropriation is objectionable, it has been used so long and so frequently that it might be said that there has been an official practical interpretation of

its meaning which renders the objectionable feature harmless, and we feel quite certain that it would be so construed if the matter was taken to the courts.

The precise point on which inquiry is now made is whether it is possible to proceed with the work, pay some of the expense out of the general corporate fund, and then reimburse that fund from the proceeds of the bonds, the intention being to submit the proposed bond issue for approval on June 5th, at the time of the forthcoming judicial election.

There is no doubt that if any considerable portion of the work were paid for before the approval of the bond issue reimbursement therefrom would be improper; but even if the work was started at once it would not be possible to do more than a small part of it before the date mentioned. Hence, this point loses its significance, especially if the Council acted on the bond ordinance.

It would probably be wise not to start the work until the City Council has passed the ordinance authorizing the bonds. If that is done the intention of the City Council to pay for the improvement out of the proceeds of bonds would be manifest, and it would require an extremely technical application of the law to prevent reimbursement of the proportionately small expenditure incurred.

After the approval of the bond ordinance there would be no doubt about the right to draw on the general corporate fund until such time as the necessary arrangements could be made to finance the issue. The law does not apply to the form but rather to the substance of the matter. In other words, it is not the exact order of procedure, or the precedence of one particular act before another that will control, but the general course of conduct clearly manifesting the intention is the thing that is important.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Frontage Consent Signed by Trustee.

April 3, 1922.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

Your letter dated March 31, 1922, in reference to the erection of a garage to be located at 421-427 E. 43rd street, together with the frontage consents filed with your department on November 28, 1921, have been received and in compliance with your request for an opinion as to the validity and legality of the frontage consent given by The Chicago Title and Trust Co., for the property located at 4317-4319 Vernon avenue, I submit the following:

The Chicago Title and Trust Company holds title to the property as trustee under a deed in trust which provides in part the following:

“Full power and authority is hereby granted to said trustee to improve, manage, protect and subdivide said premises or any part thereof, to dedicate parks, streets, highways or alleys and to vacate any subdivision or part thereof, and to resubdivide said property as often as desired, to contract to sell, to sell on any terms, to convey either with or without consideration, to donate, to dedicate, to mortgage, pledge or otherwise encumber; to lease said property or any part thereof, from time to time, by leases to commence *in praesenti or in futuro*, and upon any terms and for any period or periods of time, not exceeding 198 years, and to renew or extend leases upon any terms and for any period or periods of time and to amend, change or modify leases and the terms and provisions thereof at any time or times hereafter; to partition or to exchange said property, or any part thereof, for other real or personal property, to grant easements or charges of any kind, to release, convey or assign any right, title or interest in or about said premises and to deal with said property and every part thereof in all other ways and for such other considerations as it would be lawful for any person owning the same to deal with the same, whether similar to or different from the ways above specified, at any time or times hereafter.”

This provision clearly gives the trustee full power and authority to sign a petition for the purpose of giving frontage consent.

The rights and powers of a trustee properly qualified and appointed are derived from, and measured and limited by, the instrument creating the trust.

In re Markle, 182 Pa. St. 378.

It is stated in your letter that one Edwin G. Rellihiien signed as agent for May E. Rellihiien for the frontage consent of the same parcel of land to which the Chicago Title and Trust Co. had consented, but from the terms in the deed in trust, it clearly appears that the trustee had full power and any other signature for the same piece of property is superfluous.

It therefore follows that the Chicago Title and Trust Co., as trustee, had the legal right to consent to the erection of the garage in question.

Yours very truly,

HARRY F. CHAVERIAT,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Railroad Track Scales.

April 5, 1922.

HON. WILLIAM STOCKER, Inspector of Weights & Measures.

Dear Sir:

We have your letter of February 8th in which you inform us that a certain class of dealers make it a practice to sell coal by the wagon load from cars which are set out on railroad team tracks. You further inform us that in many cases the weights are charged by guess and you inquire if it is within the power of the City Council to pass an ordinance requiring the various railroad companies to install wagon scales at their team tracks within the city in order that a convenient means of weighing the coal which is sold by the wagon load may be provided.

We have made a careful search of the authorities but are unable to find where the Legislature has delegated to the

City Council the power to require railroad companies to provide wagon scales at their various team tracks.

We are of the opinion, however, that if a sufficient showing of the necessity therefor could be made to the Illinois Commerce Commission that it would be within their discretion to order the railroad companies to provide wagon scales at their team tracks.

If you will furnish us with the facts in one particular case of a team track where you deem it necessary that a wagon scale be provided in order that means may be had for the weighing of coal which is sold by the wagon load, we will prepare the necessary petition and file it with the Illinois Commerce Commission.

Yours respectfully,

FRANK W. DERBY,
Assistant Corporation Counsel

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Custody of Stolen Property.

April 5, 1922.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

Replying to your request for an opinion relative to whether or not your department is compelled to comply with a certain order, entered by Judge Lawrence B. Jacobs, on April 1, 1922, in the case of *People v. Greenfield*, case No. 146635, ordering the "police custodian" to turn over two mink furs to one Lot Bernhardt, the prosecuting witness in that case, permit us to say:

As a general rule, it should be stated that an order of court, even though erroneous, should be complied with until reversed or otherwise vacated, *provided the court had jurisdiction* of the persons and subject matter of the case.

In this case the order is informal, in that it purports to

relate to a certain "police custodian" without clearly designating he is the "Custodian of Lost or Stolen Property," of the City of Chicago, and, indeed, without specifying whether he is an official of the City of Chicago at all, or of some other municipality of the county. Such irregularity, however, while erroneous, would not, in our opinion, go to the *jurisdiction of the court* and would not therefore justify your department in ignoring the order.

A more serious objection to the order, however, and one which, in our opinion, renders it *absolutely void*, is the fact that neither the custodian of lost or stolen property nor his superior officer was a party to the suit in which the order purports to have been entered. The suit was between the people of the State of Illinois and Louis Greenfield. Lot Bernhardt was only a prosecuting witness, and the custodian does not appear to have even been brought in as a witness, much less as a party to the suit. The court was therefore wholly without jurisdiction to enter the order, and, the order being void, the custodian can not safely rely upon the same, nor escape possible liability on his bond by doing so.

Apparently the court was misled into entering the order, by the fact that the state's attorney and the attorney for the complaining witness agreed to the entry thereof. But as neither of these gentlemen represented the custodian, no agreement that they might enter into, would, in our opinion, affect the rights of your department, in general, or the custodian of lost or stolen property, in particular.

We are of the opinion, therefore, that the court was wholly without jurisdiction to enter the order in question and that the custodian of lost or stolen property would be justified in disregarding the same.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Copies of Birth Reports.

April 11, 1922.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

In reply to your request for an opinion from the corporation counsel relative to whether in making copies, for the records of your department, of birth reports sent in by attending physicians and midwives, prior to forwarding such original reports to the State Department of Public Health at Springfield, it would be lawful to make such copies by a photostat instead of by hand; and whether in furnishing certified copies of records in your office it would be lawful to make such copies by photostat, permit us to say:

The law, in requiring public records to be kept, demands only that the entries therein be made in an accurate manner. *How* they are made, whether by hand or by machine, and if the latter, what kind of machine—typewriter, printing press, photostat, or what not—is wholly immaterial in law. The same rule applies to certified copies. If the copy is accurate and is signed by the proper officer in his own handwriting, it is immaterial how the body of the copy is made, whether by hand, or by letter press, printing press, photostat, etc.

That a photographic copy of a record is one of the legal methods of making a copy of the same, is well settled.

Howard v. Illinois Tr. & Sav. Bank, 189 Ill. 568.

1 Greenleaf on Evidence (16th Ed.), 439.

Indeed, we can see no difference in principle between a photostatic copy and a letter press copy, which latter form of evidence has frequently been approved by our courts.

Union Surety Co. v. Tenney, 200 Ill. 349.

Curran v. C. & W. I. R. Co., 213 Ill. 7, 14.

Internat. Text Book Co. v. Mackhorn, 158 Ill. App. 543.

Needless to say, however, all such copies, however made, must be properly certified to and signed, in writing, by the proper officer.

We are of the opinion, therefore, that your proposed method of furnishing certified copies would be legal and proper.

Yours very truly,

CARL J. APPELL,,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

City's Control of Rents.

April 12, 1922.

HON. ROBERT J. MULCAHY, Chairman Sub-Committee on High Costs and High Rents.

Dear Sir:

In pursuance of a resolution passed by the City Council on March 22, 1922, directing the corporation counsel to submit to your committee an opinion relative to the application of the recent U. S. Supreme Court decision in the New York Rent Commission case, to conditions in Chicago under the existing laws and constitution of this state, we respectfully submit the following:

The decision of the Supreme Court in that case, as well as in the prior case of *Block v. Hirsh*, 256 U. S. 135, involving the validity of the District of Columbia Rent Commission Act, follow very broad lines, and, in effect, base the power of rent regulation upon the fact that the present shortage of dwellings is an abnormal condition, caused by the recent war, and that it is a legitimate function of government to pass such laws as will minimize "profits from a national misfortune;" that such regulations, while different in degree, is not different in kind from such familiar regulations as those restricting the height of buildings, or the restrictions placed upon the owners of money by the usury laws.

In *Block v. Hirsh, supra*, the court said:

"The fact that tangible property is also visible tends to give rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But

the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay. Under the police power the right to erect buildings in a certain quarter of a city may be limited from eighty to one hundred feet. *Welch v. Swasey*, 214 U. S. 91. Safe pillars may be required in coal mines. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531. Billboards in cities may be regulated. *St. Louis Poster Advertising Co. v. St. Louis*, 249 U. S. 269. Watersheds in the country may be kept clear. *Perley v. North Carolina*, 249 U. S. 510. These cases are enough to establish that a public exigency will justify the Legislature in restricting property rights in land, to a certain extent, without compensation. *But if to answer one need the Legislature may limit height, to answer another it may limit rent.* We do not perceive any reason for denying the justification held good in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature but they certainly are not less pressing.”

The same principles were reiterated in the case of *Marcus Brown Holding Company v. Feldman*, 256 U. S. 170, sustaining the validity of the New York Rent Laws of 1920.

In view of the broad bases of these decisions, there cannot, in our opinion, be any doubt that the Legislature of this state would have the same power to pass such rent laws, as the Legislature of New York has. The powers of the Legislature are plenary where not limited by the Constitution, and there is no limitation in our state constitution touching the matter above mentioned.

But while the powers of the State Legislature to regulate rents are very broad, the powers it has seen fit to confer upon the City Council in this regard are less extensive. No express authority to regulate rents has been vested in the City Council. A bill to that effect was introduced in the last Legislature, but failed of passage. Until such express authority shall be granted, therefore, the City Council can exercise such

power only to the extent that it may be said to be inferentially conferred in the grant of authority to exercise police power for the promotion of health, safety, morals and public welfare. But the city is not clothed with *all* the police power of the state, but only such as is essential to the proper exercise of powers clearly conferred.

City of Chicago v. M. & M. Hotel Co., 248 Ill. 264.

Anyway the police power is of a somewhat vague and general character, difficult to describe in detail.

Town of Lake View v. Rose Hill Cem. Ass'n., 70 Ill. 191.

Biffer v. City of Chicago, 278 Ill. 562.

East Side Levee Dist. v. E. St. L. & C. Ry. Co., 279 Ill. 125.

In the last mentioned case our Supreme Court said:

“The police power has been defined by this court as that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety and welfare of society. It is co-extensive with self-protection, and is not inaptly termed the ‘law of overruling necessity.’ *Town of Lake View v. Rosehill Cemetery Co.*, 70 Ill. 191. The extent of this power has never been defined with precision. Indeed it can not be accurately defined and the courts have not been able or willing definitely to circumscribe it.”

In view of the more or less indefinite limits of the police power, we would not presume to say that it would be impossible for your committee to devise some plan that might indirectly tend, to some extent, to affect the regulation of rents, but so far as direct regulation of rents is concerned, that is a power which has not been conferred upon the city.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Liability of City for Damage to Automobile.

April 15, 1922.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

In reply to your request for an opinion relative to the validity of the claim of Mr. Peter Fleming (Lightfoot and Braun, attorneys), for compensation for damages to his auto, alleged to have been caused by striking a manhole on Harding avenue, near North avenue, permit us to say:

We find nothing in the facts stated in the letter you submitted to us, from Fleming's attorneys, that would render the city liable for this accident. Immediately upon receipt of your first letter, we asked the Bureau of Streets to investigate the accident, but so far we have received no report from them. In this state of facts we shall assume therefore, that there were no unusual circumstances connected with the case, but that Fleming's car simply hit a manhole, that happened to be open. How long the manhole had been out of repair does not appear. Neither does it appear that the city authorities had any notice that it was out of repair.

It is an elementary proposition of law that the city is not an *insurer* of the safety, and perfect state of repair, of its streets. All that can be demanded of the city is that it shall use *reasonable care* to keep its streets in a *reasonable* state of repair. The city is not liable for damages caused by defects in its streets, unless the city has had notice of such defects, or unless they have existed for such length of time that the city must be presumed to have notice of same.

In the case of *City of Chicago v. Watson*, 6 Ill. App. 344, Judge McAllister, in delivering the opinion of the court, said:

"The law does not regard the corporate duties of the City of Chicago as placing the corporation in the position of *insurer against accident* to individuals upon its streets and sidewalks, or require any absolute degree of perfection in respect thereto. Hence it follows that it is not liable for every defect therein, though such defect may be the cause of the injury sued for. In the absence of any acts of positive misfeasance on the part of the cor-

poration, its officers, servants or others acting under its authority, within the scope of its powers *it is responsible only for the exercise of reasonable diligence in keeping its streets and sidewalks in a reasonably safe condition* for travel in the ordinary modes, by night as well as by day, by any person in the exercise of reasonable or ordinary care to avoid accidents. It is liable to a person so in the exercise of reasonable or ordinary care for any injury received by reason of the bad and unsafe condition of a sidewalk as well when those defects are caused by the wrongful acts of others, as when they are the mere result of the neglect of the corporation itself; but in such cases the basis of the action being negligence, *it is essential to a cause of action that the corporation had notice* of the defective and unsafe condition of the street or sidewalk which caused the injury, or facts to be shown from which such notice may reasonably be inferred; or that proof be given of such circumstances pertaining to such unsafe condition as that the corporation, or its officers having authority to act respecting it, might or ought, by the exercise of reasonable diligence, to have known of it, on the principle that having the means of knowledge and negligently remaining ignorant, is equivalent, in creating a liability, to actual knowledge."

In *Boender v. City of Harvey*, 251 Ill. 228, our Supreme Court said:

"The city is not bound, under law, to keep its streets *absolutely safe*. It is only bound to use reasonable care to keep its streets reasonably safe for ordinary travel thereon by persons using due care and caution for their safety. * * *

"Municipal corporations can not be held liable for every accident that occurs within their limits, but the defect must be such as could have been foreseen and avoided by ordinary care and prudence of the city authorities. * * * Whether a defect in the street is caused by the act of a third person or the failure of the city to repair in general, *the city is not liable unless it had notice of the defect*, or of such facts and circumstances as would by the exercise of reasonable diligence lead a prudent person to such knowledge."

Other cases to the same effect are:

City of Chicago v. McCarthy, 75 Ill. 602.

City of Chicago v. Murphy, 84 Ill. 224.

Village of Chatsworth v. Ward, 10 Ill. App. 75.

City of Joliet v. Gerber, 21 Ill. App. 612.
City of Paxton v. Frew, 52 Ill. App. 393.
Ransom v. City of Belvidere, 87 Ill. App. 167.
City of Elgin v. Nofs, 96 Ill. App. 291.
Williams v. City of Carterville, 97 Ill. App. 160.
Sherman v. City of Chicago, 101 Ill. App. 313.
O'Donoghue v. City of Chicago, 167 Ill. App. 349.

We are of the opinion, therefore, that, under the facts as they appear to us, the city is in nowise liable on this claim.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Dumping of Excavated Material on City's Property.

April 18, 1922.

HON. GEORGE F. HARDING, Comptroller.

Dear Sir:

We are in receipt of a request from your department, signed by J. F. Peacock, Real Estate Agent, for advice relative to the right of the city to authorize the dumping of excavated material on vacant properties to which the city has tax deeds. In reply, permit us to say:

If such tax deeds are valid, the city has the absolute title to such properties and may use the same for dumping grounds, or make any other legitimate use thereof it may see fit.

But on the other hand, if such tax deeds are invalid, then the city has no title whatsoever to the properties in question, but merely a "*color of title*," with an equitable right to reimbursement for the amount it has paid for the tax deed, together with legal interest and such penalty as may have been fixed by the tax sale. We might say, in this connection, that tax titles are not favored by the courts, but, on the contrary, the courts are inclined to grasp at the slightest tech-

nicality to set aside the same, if their validity is attacked in court. Consequently there are not many tax deeds that will stand the test of judicial adjudication.

However, until the former owners of such properties, or their heirs or assigns, shall bring suit to set aside such tax deeds, the city (where it has tax *deeds* to such properties, and not merely tax certificates) has the right to assume that it has clear title to such premises and may use them accordingly. But if it should afterwards be adjudicated that the city's tax deed to such premises was void, the city might be required to account for any permanent injury it may have done to the premises, while occupying the same.

We do not, of course, wish to be understood to intimate that dumping excavated material on vacant property necessarily causes any damage to the same. On the contrary, it frequently, perhaps generally, constitutes an improvement of the property. But that would be a matter for the court to determine. In any event, the setting aside of a tax deed, is an equitable proceeding, in which the court will prescribe such conditions as it deems proper, including the proper reimbursement to the city for its expense and outlays, and also reasonable recompense to the owner for any damage that may have been done to his property.

In view of the legal principles above mentioned, we are of the opinion:

1. That the city has a *prima facie* right to dump refuse on, or make any other legitimate use of, vacant property to which it has tax deeds;

2. That it has a *prima facie* right to grant permits for dumping on such property and make reasonable charges therefor.

BUT:

3. If the city's tax deed to such property should afterwards be set aside, the city may have to pay the lawful owner of such property, such recompense as a court of equity may deem fair and equitable, for any material damage the

city may have done to such premises while in possession of the same.

Yours very truly,
CARL J. APPELL,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Claim of Colonial Oil Co., for Damage to Motor Truck.

April 21, 1922.

HON. JOHN A. RICHERT, Chairman Committee on Finance.
 Dear Sir:

In reply to your request for an opinion relative to the validity of the claim of the Colonial Oil Company for damage to motor truck at 3216 South Wabash avenue, alleged to have been caused by defective condition of street on January 2, 1922, we beg to state that, in our opinion, the city is not liable, for the reasons hereinafter stated.

The facts, as brought out by an investigation by the Bureau of Streets, do not fully agree with those stated by the claimant. According to said investigation the street never caved in, but was covered with thick ice, and what the truck dropped into was merely a groove or hole in the ice. The report to the superintendent of streets states:

“On January 1, 1922, a leak in street was reported to 3rd District Water Pipe Extension at 3 p. m. Water Pipe Extension barricaded and protected same with red lanterns on afternoon of January 2, 1922. (Report of leak made by police of Stanton avenue station.) The W. P. Ex. did not open street pavement until morning of January 3, 1922. Street did not cave in and no opening had been made in pavement at time of accident.

“The leak, which was in the joint of a 24 in. main, had flooded the street and covered the pavement with ice for about 75 ft. in both directions from 3216 Wabash avenue the full width of street. The ice had thickened to about one foot at location of accident and the flow of water from leak had a trough worn in ice from curb to curb. It was by driving over the ice and crossing over

this trough that caused accident. As damage was done by truck dropping from top of ice into trough and not by any cave-in or defect in pavement; as accident happened at 11:30 a. m. in broad daylight and as this sheet of ice was in clear vision the full width of the street it would appear that a man driving a truck over such a condition was not exercising the proper amount of judgment in regard to safety of himself and the truck which he was driving."

Even under the facts as stated by the claimant, we fail to discover any legal liability on the part of the city. For it is an elementary proposition of law that the city is not an *insurer* of the safety of its streets. All that can be demanded of a municipality is that it shall use *reasonable* care to keep its streets in a *reasonably* safe condition. It is not liable for damages caused by defects in its streets unless the city has had notice of such defect, or unless the circumstances are such that the city must be presumed to have notice. Here it is not claimed that the city had any notice of any cave-in of the street, nor could it reasonably be presumed that the street would cave in in the middle of winter when the ground was hard frozen (if indeed, it did cave-in, which the Bureau of Streets denies).

In the case of *City of Chicago*, 6 Ill. App. 344, Judge McAllister, in delivering the opinion of the court, said:

"The law does not regard the corporate duties of the City of Chicago as placing the corporation in the position of *insurer against accident* to individuals upon its streets and sidewalks, or require any absolute degree of perfection in respect thereto. Hence it follows that it is not liable for every defect therein, though such defect may be the cause of the injury sued for. In the absence of any acts of positive misfeasance on the part of the corporation, its officers, servants or others acting under its authority, within the scope of its powers *it is responsible only for the exercise of reasonable diligence in keeping its streets and sidewalks in a reasonably safe condition* for travel in the ordinary modes, by night as well as by day, by any person in the exercise of reasonable or ordinary care to avoid accidents. It is liable to a person so in the exercise of reasonable or ordinary care for any injury received by reason of the bad and unsafe

condition of a sidewalk as well when those defects are caused by the wrongful acts of others, as when they are the mere result of the neglect of the corporation itself; but in such cases the basis of the action being negligence, *it is sesential to a cause of action that the corporation had notice* of the defective and unsafe condition of the street or sidewalk which caused the injury, or facts to be shown from which such notice may reasonably be inferred; or that proof be given of such circumstances pertaining to such unsafe condition as that the corporation, or its officers having authority to act respecting it, might or ought, by the exercise of reasonable diligence, to have known of it, on the principle that having the means of knowledge and negligently remaining ignorant, is equivalent, in creating a liability, to actual knowledge."

In *Boender v. City of Harvey*, 251 Ill. 228, our Supreme Court said:

"The city is not bound, under the law, to keep its streets *absolutely safe*. It is only bound to use reasonable care to keep its streets reasonably safe for ordinary travel thereon by persons using due care and caution for their safety. * * *

"Municipal corporations can not be held liable for every accident that occurs within their limits, but the defect must be such as could have been foreseen and avoided by ordinary care and prudence of the city authorities. * * * Whether a defect in the street is caused by the act of a third person or the failure of the city to repair in general, *the city is not liable unless it had notice of the defect*, or of such facts and circumstances as would by the exercise of reasonable diligence lead a prudent person to such knowledge."

It is apparently conceded that the immediate cause of the accident was the peculiar formation of the ice which covered the street on the date in question. This, however, was not due to any fault of the city, but was, in our opinion, simply one of those uncontrollable phenomena, usually classified in law as "Acts of God," upon which no legal liability can be based.

Dean v. Belt Ry. Co., 210 Ill. App. 220.

Merchants' Despatch v. Smith, 76 Ill. 542.

Hecht v. Boston Wharf Co., 220 Mass. 397.

For the reasons above set forth, we are of the opinion that the city is in no wise liable on this claim.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Expenses Chargeable to Mayor's Contingent Fund.

April 23, 1920.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

You forwarded to us a number of bills, which you say were for purchases made by Dr. John H. Williamson, and you ask to be advised as to the legality of charging these items to the mayor's contingent fund.

The bills in question all bear the "O. K." of Dr. Williamson, but that, of course, is not sufficient to warrant the payment of money out of the fund you speak of. The appropriation bill provides that the heads of the departments shall administer the various funds set up for their departments. In the case of this particular fund, while it is set up under the head of "Department of Finance," the ordinance specifically requires that it shall be expended under the direction of the mayor and the city comptroller. Hence, the bills would have to be approved by the mayor and yourself before vouchers therefor could be honored.

We assume, however, that it is not the form of the bills but the substance of same which gives rise to the inquiry. That is to say, you want to be advised whether it is proper for you and the mayor to approve the bills and put them into process of payment.

As to this, we can only say that if the bills have been incurred for a corporate purpose and are within the appropriation they may lawfully be paid. They appear on their face to be for circular letters, notices, envelopes and letter-

heads, respectively. That is all the information we have concerning them. All these may be proper and necessary for the dispatch of public business of the city. If such is the case, the mere fact that the mayor caused the bills to be incurred through Dr. Williamson does not make them less binding on the city. It is for the mayor to say whether or not they are for corporate purposes, and his approval of same would be sufficient warrant for you to honor them.

It has always been understood that one of the reasons for creating the mayor's contingent fund from year to year was the fact that there are some public uses to which money can be applied which a strictly technical interpretation of the words "corporate purposes" would not permit. Among such uses may be mentioned the hiring of carriages when some foreign official of note comes to the city, the membership of the city in leagues of municipalities, the participation of an officer of the city in some public event as the representative of the city, etc. All these uses may be far more remote from the strict letter of the law than the purposes for which this printing was obtained.

Such being the case, we believe that the mayor's approval or disapproval of the bills would be within his discretion, and if he gives his approval, they may properly be paid.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Tower on Proposed Church and Office Building.

April 27, 1922.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

We are in receipt of your letter of recent date concerning tower which the architects have designed for the building to be erected at the southeast corner of Clark and Washington streets.

You state in your letter that you have instructed the architects to deliver a set of plans to us in order that we may examine them for the purpose of determining whether it would be proper to issue a permit for such structure as now projected. Enough of these plans have arrived so that with the letter of the architects which you attached to your own communication we are advised of the details and point of view of the applicants for the permit and can pass on the question.

The lot on which the edifice is to be erected has a frontage of approximately 80 feet on Washington street and 182 feet on Clark street. The proposed tower is planned to set back 12 feet from either side of the corner, with ornamental features projecting into that space, and is to be octagonal in shape, with a width or diameter of 45 feet. The sides of the octagon appear to be about 19 feet. The question is whether such width of 45 feet is contrary to the ordinance of the city limiting the dimensions of such towers.

The only part of the ordinance in question (Section 576 of The Chicago Code of 1911) which has any bearing on the subject is contained in the following sentence:

“Towers, domes and spires may be built on top of the roofs of buildings, but shall not occupy more than one-quarter of the street frontage of any building.”

In the other respects that this section prescribes limitations no question can arise, because the proposed tower is well within the maximum area, height, etc.

It is contended by the architects that the frontage on the two streets must be added together and that a tower may be erected the width of which does not exceed one-fourth of the total. In other words, they say that the frontage is approximately $262\frac{1}{2}$ feet, that the main body of the tower is 45 feet in width, and that the 45 feet is less than the total street frontage of the building.

The reasoning by which they arrive at this conclusion is not tenable. If the frontage of the lot on the two streets is taken as the basis for computing the size of the tower, then the frontage of the tower on the two streets must also be taken as the amount of frontage it occupies. That would mean a

frontage of ninety feet for the tower. Again, it can be demonstrated that if such a computation is to be countenanced a corner building could be surmounted by a tower four or five times as large as a building on an inside lot. Manifestly, such a construction of the ordinance is wrong.

There is even some doubt as to whether any part of the frontage on Clark street can be counted as frontage for this purpose. Under Section 424 the shorter dimension of the lot is defined as the width. Hence, that would make the Washington street frontage the only frontage that could be considered. As to this, however, we do not believe it was so intended by the City Council. That section related to the building of tenement houses and not the building of towers.

It is next contended that because the tower will taper we should take as our estimate of frontage the line that would indicate the average circumference. This is also out of the question, and the process by which they reason it out is just as faulty as in the other method.

However, there seems to be ground for permitting the structure in question on account of the relaxation from the frontage, first on account of the set-back of twelve feet, and second on account of the octagonal shape of the structure.

We do not mean by this that we would be justified in taking the 19 feet which are parallel to Washington street as the amount of the frontage on that street. Such a method of calculating the frontage would lead to an absurdity, since by the same token in the case of a circular tower it could be said that it has no frontage at all on Washington street. What we mean is that if the slicing off of a corner is taken in connection with the set-back the structure will come within the prescribed frontage. We arrive at this conclusion in the following manner:

There being no serious doubt as to the right to extend along Clark street for the distance in question, we will assume that the plans showed the side of the tower parallel with Clark street extended right up to Washington street, and we will assume that the side of the tower extending northwest and southeast was also shown as extended to Washington street,

and we will assume that the side of the tower extending northwest and southeast was also shown as extended to Washington street. This would make a seven-sided tower, irregular in shape, well within the limitations as to area, etc., with a frontage of approximately twenty feet on Washington street. If such a structure were permissible under the ordinances, necessarily one from which this irregular extension has been cut off would come within the requirements.

The only thing to prevent such an irregular tower from being within the frontage limitation would be the fact that one of its sides was at an angle of 45 degrees from Washington street instead of 90 degrees.

There is nothing in the ordinances which makes it necessary to have this side of the tower at right angles with Washington street, and the question of whether or not it conforms does not depend on that but rather on the effect that the set-back has with respect to the purpose of the ordinance.

The purpose of the ordinance is to conserve light and air for surrounding buildings. Therefore, when it is shown that the proposed tower comes within the prescribed area and has actual frontage which cannot be construed as more than about twenty feet it would require an exceedingly strained interpretation to make this a technical violation. While we are not called upon to pass on questions of policy, we suggest that such modifications as are produced by the set-back shown on the plans should be encouraged where it is possible to make a concession.

From an examination of the plans it is plain that there is as much benefit secured from the set-back and the cutting off of the angles on each side (if not more) than if the tower were squarely planted on the corner and extended along the Clark street side as far as the ordinance permits.

Before conceding this point we asked the architects to make the computation for us by which we could determine whether this result would be arrived at. We find that the amount cut off from an irregular imaginary tower such as we have described is approximately 425 square feet. This is not only taken off from the area, but taken off from the front area where it is entitled to additional credit.

From this computation we have come to the conclusion that the relaxation on account of the octagonal shape, taken in connection with the set-back, brings the proposed tower within the ordinances. Hence, the parties applying for the permit are within their rights, and the permit should issue.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Liability of City for Death Caused by Police Vehicle.

April 28, 1922.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Replying to your request for an opinion relative to the liability of the claim of John A. Werr, for compensation for death of his father, Charles Werr, alleged to have been, on December, 1921, struck by a city automobile driven by Police Officer John J. Flannery, engaged in the pursuit of Tommy O'Connor, an escaped convict, permit us to say, that, in our opinion, the city is not liable on said claim, for the reasons hereinafter stated.

Wholly independent of the question as to who was at fault, the law is well settled that the city is not liable for any torts committed by its policemen, the reason being that our Supreme Court has held that the city, in the exercise of the police power is performing, not a *corporate* function, but a *governmental* function imposed upon it, regardless of its own wish or consent, by the state, and that, for that reason, police officers, although appointed and in a certain sense controlled by the city, are *not municipal*, but *state* officers, for whose acts the city is in no wise liable.

Wilcox v. City of Chicago, 107 Ill. 334.

Culver v. City of Streator, 130 Ill. 238.

Craig v. City of Charleston, 180 Ill. 154.

City of Chicago v. Williams, 182 Ill. 135.

Johnston v. City of Chicago, 258 Ill. 494.

In the case of *Culver v. City of Streator*, *supra*, our Supreme Court said:

“Police officers appointed by the city are not its agents or servants so as to render it responsible for their unlawful or negligent acts in discharge of their duties.”

After citing a number of authorities in support of that proposition, the court continues:

“The ground upon which the foregoing cases, and many others of a like nature, are admitted as exceptions to the general rule of corporate liability, is, that in those matters the city acts only as the agent of the state, in the discharge of duties imposed by law for the promotion and preservation of the public and general welfare, as contradistinguished from mere corporate acts, having relation to the management of its corporate or private concerns, and from which some special or immediate advantage or emolument in its corporate or private character.

“The police regulations of a city are not made or enforced in the interest of the city in its corporate capacity, but in the interest of the public. A city, therefore, is not liable for the acts of its officers in attempting to enforce such regulations.”

In *City of Chicago v. Williams*, 182 Ill. 135, the court said:

“Police officers are not agents or servants of the city, appointing them, within the rule making the corporation answerable for their acts, nor is a municipal corporation liable for the non-feasance or misfeasance of the officers of its police. There is an implied or common law liability for the negligence of municipal officers in the performance of *corporate* acts, which have relation to the management of the *corporate or private* concerns of the municipality, from which it derives special or immediate profit or advantage as a corporation. But where acts are done by the officers of towns and cities in their *public capacity* in the discharge of duties imposed by law for the public benefit and for the promotion and preservation of the public welfare, no private action lies unless the right to bring it is expressly conferred.”

Nor will the fact that the automobile which struck Mr.

Werr was owned by the city, render the city liable. For the law is settled, in this state, that the owner of an automobile is not liable for any damages done by the same, when operated, even with the owner's consent, by another person, unless such person was then an agent of the owner and engaged in doing *his* business (*Arkin v. Page*, 287 Ill. 420); and the police, as we have seen, are neither agents of the city nor engaged in its business, in a legal sense.

For the reasons above set forth we are of the opinion that the city is not liable on this claim.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Disposition of Riot Cases.

May 2, 1922.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

In response to your communication of recent date, in reference to the pending riot cases, in which you state that your committee will not consider these claims except upon an opinion of liability on the part of the city and a recommendation from us, we desire to advise you that 16 of the cases involved in the resolution of the City Council, passed on November 23, 1921, are suits brought against the city for the death of persons as the result of injuries inflicted by a mob during the so-called race riots which occurred in this city during the months of June and July, 1919, and the remaining two cases are suits for the recovery of damages for personal injuries sustained by the plaintiffs at the hands of mobs during the so-called race riots.

Section 4 of Paragraph 256v of an act to suppress mob violence, approved May 6, 1905, in force July 1, 1905, provides as follows:

“256v. PENALTY FOR INFLECTING DAMAGES—LIABILITY OF CITY AND COUNTY.) § 4. Any person or persons, composing a mob under the provisions of this act, who shall by violence inflict material damage to the property or serious injury to the person or any other person upon the pretense of exercising correctional powers over such person or persons, by violence and without authority of law, shall be deemed guilty of a felony, and shall suffer imprisonment in the penitentiary not exceeding five years; and any person so suffering material damage to property or injury to person by a mob shall have an action against the county or city in which such injury is inflicted, for such damages as he may sustain to an amount not exceeding five thousand dollars.”

Section 1, of Chapter 70, Hurd's Revised Statutes, 1919, page 1663, of an act entitled, “An Act requiring compensation for causing death by wrongful act, neglect or default.” Approved February 12, 1853, in force February 12, 1853, provides as follows:

“Be it enacted by the People of the State of Illinois, represented in the General Assembly: Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.”

Under the Statutes of the State of Illinois, any collection of individuals, five or more in number, assembled for the unlawful purpose of offering violence to the person or property of any one supposed to have been guilty of the violation of the law, or for the purpose of exercising correctional powers or regulative powers over any person or persons by violence, and without lawful authority, shall be regarded and designated as a mob. Where such a mob inflicts injuries upon an individual on account of his religion or race, it will be, in all likelihood, successfully contended that the injuries in-

inflicted by said mob are for the purpose of exercising correctional or regulative powers over such person, and the action of the mob constitutes a denial to him of the right to life, liberty and the pursuit of happiness as guaranteed by our Constitution; and, where it is proved that a mob, within the meaning of the statute, has inflicted such injuries, the court will, in our opinion, be inclined to hold the city liable, and that, if a person so injured survives the injuries inflicted, he would have a right to maintain an action against the city under the provisions of Section 256v, above quoted. Where death results from the injuries inflicted, as above described, it is our opinion that, under the provisions of Section 1 of Chapter 70 of Hurd's Revised Statutes of 1919, page 1663, a cause of action survives, and that the next of kin of the said deceased would have a right to maintain a suit for damages for the death of such person, and that the individual, firm or corporation who would have been liable for damages to the injured person, had death not ensued, would be liable to the next of kin, and, under the law, should be required to respond in damages to the defendant heirs at law or next of kin of the said deceased.

The case of Louis Phillips is a suit for the recovery of damages for injuries inflicted upon the plaintiff at the hands of a mob at 39th and Halsted streets. The plaintiff in this case was shot in the head and his right eye put out, and has been permanently crippled as a result of the injuries sustained by him. If this case is settled, the attorneys for the plaintiff are asking \$5,000.

The case of William Stewart is a suit for the recovery of damages for personal injuries sustained by the plaintiff at the hands of a mob at 35th and Wabash avenue, who shot him through his body and broke one of his legs. The plaintiff's attorney feels that the city should pay the sum of \$3,000 in settlement.

We desire to advise you that three of the so-called riot cases have been tried, and in each case the jury has returned a verdict of guilty, and the courts have entered judgments upon the verdicts; one for the sum of \$2,300, one for \$3,500 and one for \$5,000.

Since our former communication to you, the Appellate Court has passed upon the question of the liability of the city for a death resulting from injuries sustained at the hands of a mob during the so-called race riots.

In discussing the liability of the city in the case of *Barnes v. City of Chicago*, 225 Ill. App. 31, the Appellate Court said:

“Plaintiff in error brought an action against the City of Chicago predicated upon ‘An Act to suppress mob violence,’ in force July 1, 1905. (Ch. 38, pars. 537 to 542, Cahill’s Stats.) The city’s demurrer to the declaration was sustained and plaintiff elected to stand by her narr.

“The declaration was in two counts. The first charged an assemblage of five or more persons in said city for the unlawful purpose of offering violence to the person and property of any one supposed to have been guilty of a violation of the law, and for the purpose of exercising correctional and regulative powers on any person or persons by violence and without lawful authority, and that said mob, composed of such persons while so assembled did fall upon, lynch, shoot, wound and kill one John W. Simpson, the son of plaintiff, a single and unmarried man, who left plaintiff, his mother and lineal heir, who prior to his death was dependent upon him for support.

“The second count set forth the same matters, with averments that Simpson was a police officer, exercising his duties as such when so victimized by the mob.

* * * * *

“It is contended by counsel for the city that the declaration is defective in that it does not allege that the mob assembled for the unlawful purpose of offering violence, etc., to said Simpson, ‘supposed to have been guilty,’ etc., or, ‘for the purpose of exercising correctional powers or regulating powers over said Simpson by violence.’

“It is argued that ‘such other person’ suffering death by lynching, as referred to in Section 5, relates back to the particular person supposed to have been guilty of a violation of the law to whom the mob purposed to offer violence, or to exercise correctional powers over; in other words, that the declaration should allege that the mob assembled to offer violence to the particular person who was lynched.

“We think this construction violates the intent and

purpose of the act, as defined in its very title, 'An Act to suppress mob violence.' As measures to that end it penalizes by a fine any of the persons composing the mob, whether injury results or not, and by imprisonment in the penitentiary if damage to property or serious injury to the 'person or any other person,' etc., results, and furthermore, gives a right of action against the municipality, in which any such injury is inflicted, to 'any person so suffering' such damage or injury, and to certain dependents of a person lynched by the mob. In other words, the act penalizes not only persons composing the mob but the city wherein it does violence. In this respect the act is both remedial and penal; remedial so far as it provides for compensation to the injured parties, and penal so far as it renders the city responsible for the results of mob violence.

"Such an act is a police regulation, and should, of course, be construed with reference to effecting its object, which, among other things, is to hold a community responsible for the effects of mob violence within it. It is said in *County of Alleghany v. Gibson*, 90 Pa. St. 397, 418, where the subject is ably discussed, that the theory upon which penalizing a municipality in such a case is based, is that with proper vigilance acts of violence may be and ought to be prevented, and that a political subdivision of the state should be held responsible for the public peace and protection to life and property from mob violence.

"We fail to see in the act a purpose to limit its provisions in case of lynching to a dependent of the particular person lynched. The result of lynching is no less serious to the community, or persons affected, whether the mob expends its violence on a particular party against whom it purposes vengeance, or some innocent bystander. The instances are not few where mobs have taken into their own hands the punishment of one who was unquestionably guilty of the crime which provoked the assemblage. But can it be said that the dependent of such criminal is more entitled to consideration and compensation, so far as the act is remedial in its nature, than a dependent of an innocent party, or that the purpose of the act, the suppression of mob violence, will be conserved in one case and not in the other? We think the restrictive construction of the act by the city's counsel in this respect, is not in harmony with its manifest purpose to impose responsibility upon the community itself for mob violence of that character.

“The contention of defendant in error is that the phrase ‘such other person,’ in Section 5, should be carried back to Section 1 for its antecedent. Such strict construction would leave the words ‘or persons,’ immediately following, with doubtful reference, and if given to the same words in Section 4, would limit the felony to damaging the property of, or injuring the particular person against whom the mob had assembled for violence and none other. It would be strange, indeed, if such a construction should prevail when the following part of Section 4 gives the right of action against the county or city for such damage or injury to ‘any person so suffering’ damage to property or personal injury. It must be admitted that a less cumbersome phraseology might have been employed. But as ‘such other person,’ referred to in Section 4, is a party whose property or person is injured, and the same phrase in Section 5 refers to a person ‘lynched,’ it is manifest the two phrases can not refer to the same person. While the language is somewhat ambiguous it should be interpreted with reference to the intent and purpose of the act. If the word ‘other’ in Section 5, which seems to have no logical connection, be treated as surplusage, the construction of the section is simple and conforms to that contended for by plaintiff in error. In fact its ambiguity is emphasized when considered in connection with the same word in the relative clause following it, to-wit, ‘upon any *other* person who shall hereafter suffer death by lynching at the hands of a mob.’

“Such a construction is also in conformity with the elementary principle that a person must be held to intend the natural consequences of his act and that, therefore, the victim of mob violence may be said to be the object of the unlawful purpose of its assemblage.

“In an action brought under a similar law to recover against a county for the lynching of one Mitchell, in *Commissioners of Champaign Co., etc., v. Church, Admr., etc.*, 62 Ohio St. Rep. 318, 348, the jury were charged that the lynching did not raise a presumption of law that the mob assembled with that intent. The court held the instruction was erroneous, referring to the ancient doctrine of the criminal law, that although the assembly were lawful, the persons assembled might unite in unlawful conduct and thus become rioters. So we think it is inferable from the declaration that the assemblage was for the unlawful purpose of exercising violence or correctional powers upon any party lynched

as the result of such assemblage. Hence we think the court erred in sustaining the demurrer. Accordingly the judgment will be reversed and the cause remanded.”

In the face of the opinion in the Barnes case, it will be rather difficult for the city to defend the so-called riot cases. While the rule is that the decision of the Appellate Court is binding only in the case in which it is rendered, nevertheless, we have no doubt that the *nisi prius* courts will follow this opinion in all cases reached for trial before there is a final expression on the point at issue from the Supreme Court. Hence, while there may be some object in waiting for such an authoritative decision as would be rendered if the matter of settlement were held in abeyance until then, it will necessarily cost the city a great deal more if the Supreme Court takes the same view as the Appellate Court. Many cases will have matured into judgment and no settlement for a smaller sum than the amount of the judgment may then be accepted. Even those claims that have not been reduced to judgment will, in that event, probably have to be settled on a higher basis.

In consideration of the foregoing, we believe the interest of the city can best be served if an effort is made to adjust amicably the so-called riot cases now pending in court.

Yours very truly,

JAMES W. BREEN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Repair of Pavement in Subway.

May 5, 1922.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

In reply to your request for an opinion relative to whether you can require the railroad companies operating over the subway in 63rd street, between State street and

Wentworth avenue to repair and maintain the pavement in said subway, we beg to state that our Supreme Court has held, in the case of *People v. Illinois Central R. R. Co.*, 235 Ill. 374, that where a railroad company, in pursuance of an ordinance to that effect, has elevated its tracks, built a viaduct over the street and once paved such street under the viaduct, its duties in regard to the same are terminated, and it need not thereafter repave the street when it again gets out of repair, unless reservations to that effect have been made by the city in the track elevation ordinance, which we understand was not done in this case.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Vehicle License for Vice Consul of France.

May 5, 1922.

HON. AGE ZYLSTRA, City Collector.

Dear Sir:

We have your letter of April 28, 1922, in which you state that the Vice Consul of France, Henri A. N. Didot, 108 S. LaSalle street, claims exemption from the city vehicle tax by reason of a convention concerning the rights and privileges of consuls concluded February 23, 1853.

The first paragraph of Article 2 of the said convention reads as follows:

“The Consuls-General, Consuls, Vice-Consuls or Consular Agents of the United States and France, shall enjoy in the two countries the privileges usually accorded to their offices, such as personal immunity, except in the case of crime, exemption from military billetings, from service in the militia or the national guard, and other duties of the same nature; and from all direct and personal taxation, whether federal, state or municipal. If, however, the said Consuls-General, Consuls,

Vice-Consuls or Consular Agents are citizens of the country in which they reside; if they are, or become, owners of property there, or engage in commerce, they shall be subject to the same taxes and imposts, and with the reservation of the treatment granted to Commercial Agents, to the same jurisdiction, as other citizens of the country who are owners of property, or merchants."

We are informed by the secretary to the said Vice Consul of France, that the automobile in question is not the property of the Government of France, but is the personal property of said vice consul and is used by him as a pleasure car.

Such being the case, and in view of the language contained in said Article 2 relative to property, we are of the opinion that the said vice consul is not exempt from paying the city vehicle tax for his automobile.

Yours very truly,

FRANK W. DERBY,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Validity of Proposed Overhead Wire Ordinance.

May 5, 1922.

HON. FRANK J. LINK, Chairman, Sub-Committee on Gas, Oil and Electricity.

Dear Sir:

Replying to your request for a formal statement of the reasons why we consider the proposed: "Overhead Wire Ordinance" unconstitutional (as we have heretofore stated verbally to your committee), we beg leave to submit the following:

In the first place, the ordinance is not based upon any express grant of power conferred upon the city by the Legislature, but rather upon its general police power. (*American Rapid Transit Co. v. Hess*, 13 L. R. A. 454.) The latter power, however, must, according to numerous decisions of

our Supreme Court, be strictly construed. In order to come within the same, an ordinance must be general, reasonable, fair and uniform, and avoid any discrimination which is not based upon clear natural distinctions.

Gulf, Colorado & St. Fe Ry. Co. v. Ellis, 165 U. S. 150.

City of Lake View v. Tate, 130 Ill. 247.

Braceville Coal Co. v. People, 147 Ill. 66.

Hawes v. City of Chicago, 158 Ill. 653.

People v. Blocki, 203 Ill. 363.

L'Hote v. Milford, 212 Ill. 418.

Haller Sign Works v. Training School, 249 Ill. 436.

People ex rel. Koch v. Rinaker, 252 Ill. 266.

People v. Kewaunee Light Co., 262 Ill. 255.

People v. Kane, 288 Ill. 236.

Sturges v. Pastel, 301 Ill. 253.

N. Y. Tel. Exch. v. Minnesota, 81 Minn. 140; 53 L. R. A. 175.

The ordinance in question is open to the charge of unreasonable discrimination in that it purports to regulate telegraph, telephone and electric light wires of private companies, but exempts from such regulation the equally, if not more, dangerous wires of the Chicago Surface Lines, the Sanitary District and the City of Chicago. This discrimination appears to us to be wholly arbitrary, and we do not believe, therefore, that an ordinance drawn along those lines will stand the test of judicial scrutiny.

In *Hibbard v. City of Chicago*, 173 Ill. 91, our Supreme Court said:

“Ordinances can not favor or discriminate against any person or class of persons, but must be uniform and of general operation within the corporate limits.”

In *People v. Blocki*, 203 Ill. 363, the court said:

“Municipal corporations are mere creatures of the legislative will, and can exercise no powers except such as the state has conferred upon them. Their governmental and administrative powers (other than those conferred by statutory or constitutional enactments, which are self-executing), can only be exercised by appropriate

ordinances. *Such ordinances must be general in character, and operate equally upon all persons within the municipality of the class to which the ordinance relates.*"

In *People v. Kewanee Light Co.*, 262 Ill. 255, our Supreme Court said:

"The legislature has the power to impose limitations upon the freedom of action of individuals or particular classes of persons, but it must do so by a general law, and if it imposes restrictions on persons engaged in a particular business, *such restrictions must be based upon some existing distinction or reason not applicable to others not so engaged.* It is only when such distinctions exist as differentiate, in important particulars, persons or classes of persons from the body of the people, that laws having operation only upon such particular persons or classes of persons have been held to be valid enactments." * * * "There must be some difference which furnishes a reasonable basis for different legislation as to the different classes, and not a purely arbitrary one, having no just relation to the subject of the legislation."

In the case of *Northern Telephone Exchange Co. v. Minnesota*, 81 Minn. 140, 53 L. R. A. 175, the City of Minneapolis had passed an ordinance requiring the telephone company to remove all its poles from the streets and place its wires in underground conduits. The Supreme Court in declaring the ordinance unreasonable and void, said:

"The plaintiff (Telephone Company) was subject to such reasonable regulations as might be, by the city authorities, adopted for the good government of the municipality to secure the necessary advantage of urban control by its citizens, and their reasonable rights as such, of which it is the conservator. * * * But this extensive power of regulation is not to be exercised at mere whim or caprice. It should be appropriate to and commensurate with the public necessity for the protection and promotion of public morals, health, safety, necessity, or convenience. * * * The addition of ten times the area through which underground conduits must be constructed at an enormous additional expense without necessity, is violative of the contract entered into between the city and the plaintiff in the ordinance under which the system was established. The requirements imposed by the later ordinance upon the company to build such

conduits through ungraded streets into suburban parts of the city and in the open country is clearly, upon its face, unreasonable, and the claim to exercise such right on the part of the common council of the city at their 'will and mere motion' cannot be sustained in the reasonable exercise of the police power. * * * *The authority thus demanded by the city touches the limits of absolutism*, and if the right of the plaintiff to use its franchise depends upon it, it amounts to an unnecessary destruction of property rights, which no municipality can or ought to exercise, and does not receive the sanction of this court."

In the case of *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S. 150, the Supreme Court of the United States said:

"Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons may be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land."

We believe that the records will show that it is true, as stated at the public hearing on the ordinance, that during the last twenty years, the great majority of serious accidents from electric wires in the city have been caused by wires owned either by the city or by the Sanitary District of Chicago, while few, if any, serious accidents have been caused by the wires of the railroad or telegraph companies, within the city. Under such circumstances, we cannot see how we shall be able to convince the court of the reasonableness of an ordinance which requires the removal of the overhead wires of the railroad and telegraph companies, but permits the wires of the city and of the Sanitary District to remain.

The only legal theory on which the ordinance undertakes to compel the removal of the wires is, so far as we can see,

that they are dangerous and hence constitute a *nuisance*. The Cities and Villages Act gives the city express power to declare certain specified things to be nuisances, but electric wires are not among them. Things not so specifically mentioned in the statute may be declared nuisances only when they have become such *in fact*.

In *City of Bushnell v. C. B. & Q. R. Co.*, 259 Ill. 391, which requires an ordinance requiring the removal of certain switch-tracks from the business district of a city, the court said:

“Some things are in their nature nuisances and are so recognized by the law. Other things are of such a character that in their nature they may be nuisances, but as to which honest differences of opinion may exist among men of impartial minds as to whether they are actually nuisances or not. * * * The ordinance here in question also declares that to be a nuisance which is not a nuisance, but which may become a nuisance under certain circumstances. The ordinance should be directed against the circumstances which are harmful, and not against the switch tracks, which are not.”

The ordinance also, it seems to us, draws a very arbitrary, and hence unlawful, distinction when it provides for the removal of railroad signal wires, but provides that the overhead power wires on electrified railroads may remain.

We are of the opinion that the proposed ordinance is also open to the charge of arbitrary discrimination in providing for the so-called zones therein mentioned. The City Council has not received, from the Legislature, any express authority to “zone” the city for any such purposes, and if it undertakes to do it under its general police power there must appear some very material natural differences between the zones in order to justify such distinctions. Now, the downtown district, no doubt, possesses such distinguishing features, but the distinctions which the proposed ordinance draws, in that regard, between, for instance, Rogers Park and Edgewater, and other parts of the city, seems to us to be wholly arbitrary, and not justified under a mere general grant of police power.

City of Bushnell v. C. B. & Q. R. Co., 259 Ill. 391.

The proposed ordinance also, in laying down certain regulations, repeatedly uses the expression "*except as hereinafter stated.*" In many cases that very expression lays the ordinance open to the charge of making arbitrary and illegal discriminations.

The proposed ordinance says, on page 3:

"All poles must be placed in alleys *where alleys are available.*"

As there might be considerable difference of opinion as to when an alley is "available," this expression, in our opinion, renders the ordinance wholly indefinite, and for that reason illegal. Some parties might contend that an alley is not "available" unless it exactly parallels a street for, perhaps, miles at a stretch, while others might allow a considerable amount of zig-zagging, and still say alleys were available. There are perhaps few alleys in the city that parallel streets for miles without a break; but how much zig-zagging would be allowable, is not stated in the ordinance.

It is an elementary principle that indefiniteness or uncertainty will render an ordinance void.

Kearney v. Andrews, 10 N. J. Eq. 70.

In the case of *Hickey v. C. & W. Ind. R. R. Co.*, 6 Ill. App. 172, in declaring that an ordinance there under consideration relating to the location of railroad tracks, was void for uncertainty, the court said:

"The functions involved in providing for the subject-matter of the ordinance under consideration, were unquestionably legislative, and the law demanded that the council should prescribe the location of the railroad *with reasonably definite lines*. If, therefore, the City Council did not, in and by said ordinance, prescribe the location of the proposed railroad with reasonably definite lines, but delegated to the railroad company itself a discretion in that behalf, the ordinance is *void upon its face.*"

The proposed ordinance further provides (p. 21):

"(3) All wires must be supported by poles of *such type and dimensions as will meet the approval of the commissioner of public works and the commissioner of*

gas and electricity; provided, however, that where wires cross elevated railroad structures or railroad subways they may be attached to the structures thereof, provided the type of construction is such as will meet the approval of the commissioner of gas and electricity."

This provision is, in our opinion, invalid, in that it delegates arbitrary and legislative power to the commissioner of public works and the commissioner of gas and electricity. To fix the *type* of construction is a legislative power which must be exercised by the City Council itself, though it might give the officers in question authority to determine whether the construction made conforms to the specifications prescribed by the City Council.

In *People v. Clean Street Co.*, 225 Ill. 470, the Supreme Court said:

"It is a well known rule of law that the City Council cannot delegate to any of its officers discretionary authority which is vested by statute or charter in it. In the American and English Encyclopedia of Law (Vol. 20, 2d ed., p. 1217), the rule is announced as follows: 'The governing body of a municipal corporation is not at liberty to delegate to a committee, or an officer or agent, governmental, legislative or discretionary functions confided to it by the legislature of the state, in the absence of express authority for such delegation.' To the same effect, see Cooley's Const. Lim. (5th ed.), p. 249, and Dillon on Mun. Corp. (3d ed), secs. 96, 97."

In *Noel v. The People*, 187 Ill. 587, the court said:

"A law which thus invests any board, or body of officials, with a discretion, which is purely arbitrary, and which may be exercised in the interest of a favored few, is invalid. It makes an unjust discrimination between persons coming within the same class. * * * Laws, thus conferring discretionary and arbitrary power upon statutory officials, are not only invalid for the reasons already stated, but amount in effect to a delegation by the legislature of its legislative functions to the board or officials in question."

In *People v. Kane*, 288 Ill. 235, the court said:

"The General Assembly cannot arbitrarily interfere with the enjoyment of rights guaranteed by the consti-

tution and cannot invest a board or commission with arbitrary discretion which may be exercised in the interest of a favored few or which affords opportunity for unjust discrimination. (*Noel v. People*, 187 Ill. 587.) Every citizen has a right to be governed by fixed rules and cannot be subjected to the will or caprice of an administrative board.”

The proposed ordinance also contains a number of provisions which, it was claimed at the public hearing, were impracticable, not to say impossible, from an engineering point of view, such as, for instance, the change from underground to overhead construction at frequent intervals. If this charge of impracticability is true, it would, of course, be an additional reason why the ordinance is unreasonable, and hence invalid.

Another reason why, in our opinion, the ordinance is invalid is that, so far as some of the railroad companies are concerned, it conflicts with some of the track elevation ordinances heretofore passed by the city. In the cases of *People v. I. C. R. R. Co.*, 235 Ill. 374, and *City of Chicago v. Pennsylvania Co.*, 252 Ill. 185, our Supreme Court held that track elevation ordinances constitute contracts between the city and the railroad companies, and when once accepted and executed, the city can not impose additional restrictions not specified in the contract and not imperatively demanded for the safety of the public. The ordinance here under consideration provides for some very radical changes on the companies' rights of way, not provided for in the track elevation ordinances, and concerning whose value, from an engineering standpoint, there appears to be considerable difference of opinion, but the expense of which would admittedly be enormous; and at the same time the ordinances give the commissioner of gas and electricity such arbitrary discretion in the matter of type of construction as to open the door for all manner of favoritism, on a large scale. That the commissioner may not actually be guilty of any such favoritism, is immaterial so far as the constitutionality of the ordinance is concerned. For the validity of an ordinance depends upon *what it authorizes* to be done, whether it is actually done or not.

There are other defects in the ordinance, but as they are

of the same nature as those above mentioned, it is unnecessary to discuss the same.

For the reasons above stated, we are of the opinion that the proposed ordinance is unconstitutional. We are preparing a new ordinance which we believe will obviate the objections above stated, and which we respectfully submit for the consideration of your honorable committee.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Liability of City for Damages Caused by Excavation on Adjoining Premises.

May 9, 1922.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

We are in receipt of your request for an opinion relative to a possible liability of the city for damages to the building at 1336 S. Michigan, which may possibly be caused by excavations, done under a city permit, on the adjoining premises, 1340 S. Michigan avenue. We have also received the accompanying letter from Attorney Robert H. Eberle, stating that in case of injury, he proposes to hold the city liable for the same. In reply permit us to say.

It is a well settled rule of law, that the owner of land has a right to have the *soil* of his premises sustained by the lateral support of the natural soil of the adjoining land, but this right is limited to the soil in its natural state, and does not extend to the support of any additional weight which the owner of the soil may place upon it, such as buildings or other superstructure, near his boundary line.

City of Quincy v. Laura Jones, 76 Ill. 231.

Kramer v. Northern Hotel Co., 185 Ill. 612.

Schroeder v. City of Joliet, 189 Ill. 48.

Lasala v. Holbrook, 4 Paige (N. Y.) 169.

In the *City of Quincy v. Jones, supra*, which is the leading case on that subject in Illinois, our Supreme Court said:

“I have a right to use my land in such, reasonable way as my judgment shall dictate, either by making excavations or superstructures thereon, subject, however, to the implied conditions that I shall not thereby interfere with my neighbor in the enjoyment of the same right in respect to his adjacent land. Each is entitled to have his soil in its natural state sustained when necessary, by the lateral support of the adjacent soil of the other; but neither has the right to burden such support by any additional weight, because this would, to that extent, appropriate the use of the property of the one, to the benefit of the other.”

The only exception that the law recognizes to this rule is where further rights have been acquired either by *contract* (as in the case of a party-wall agreement) or by *prescription*.

Mr. Eberle contends that his client has acquired such right by prescription, for the reason, as he expresses it, that

“The building at 1336 South Michigan avenue was erected many years ago.”

We fail to see, however, how those facts establish any rights by prescription. In order to prove that, it would be necessary to show that the wall of his client's building has stood partly on the adjoining lot for over 20 years and that such possession by his client has been *under a claim of right* and *adverse* to the rights of the adjoining owner, for that entire period.

In the *Jones case, supra*, the court said:

“Moreover, it seems well settled that an adverse right to an easement can not grow out of a mere permissive enjoyment for any length of time.”

To the same effect are the following cases:

Stewart v. Andrews, 239 Ill. 186.

I. C. R. Co. v. Stewart, 265 Ill. 35.

Bontz v. Stear, 285 Ill. 599.

Mr. Eberle seems to assume that the city, by issuing a permit to a party to excavate and build upon his own prem-

ises, thereby becomes a sort of *surety* or *guarantor* that he will not in any way encroach upon his neighbor's rights. Needless to say, such is not the law.

For the reasons above stated we are of the opinion that the owner of the building at 1336 South Michigan avenue has no prescriptive rights to have her property supported by the soil of the adjoining premises; but if she had, that would be a question between her and the owner of the last mentioned premises, with which the city is not concerned.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Sufficiency of Frontage Consents for Undertaking Establishments.

May 9, 1922.

HON. HERMAN N. BUNDESON, M. D. Commissioner of Health.
Dear Sir:

We have your communication *in re* application of A. J. Hupka to conduct an undertaking establishment at the south-east corner of Lockwood and Roscoe streets and also petition with frontage consents.

You inquire whether the frontage consents obtained as evidenced by the attached petition are sufficient. The ordinance involved in this matter is Section 1238 of The Chicago Code of 1911, as amended January 3, 1922 (Council Journal page 1585). So much of said ordinance as need be considered in determining this matter reads as follows:

“* * * It shall also be unlawful for any person to establish or maintain a morgue or to carry on the business of an undertaker as defined in this article, who, in connection with such business receives at his place of business the body of any dead person for embalming or other purposes, on or along any street in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes with-

out the written consent of a majority of the property owners according to the frontage on both sides of such street in such block; * * *"

The corporation counsel in an opinion sent to your office held that the council in putting in the words "on or along any street in any block" intended to prevent objectionable conditions which prevail on a street along side of an undertaking establishment as well as in front of it. Therefore, in cases where a corner is sought to be used, we must consider two streets.

In this particular matter the streets would be Lockwood and Roscoe. Taking up the former, as we find them, the west side of Lockwood avenue between Roscoe and Henderson streets, is unoccupied except by a church which fronts on Roscoe street, and the east side of Lockwood from Henderson street to the alley north and adjoining is a corner lot fronting on Henderson street and is unoccupied. Therefore, that removes Lockwood avenue from further consideration.

Our investigator reports that over two thirds of the buildings on Roscoe street between Lockwood and Laramie streets are used for residence purposes. Therefore, a majority of the frontage consents is required. The total frontage amounts to 1,203.93 feet, a majority of which would be 601.97 feet.

Checking over the attached petition with the list of property owners on the block furnished to us by the Map Department, we find that consent has only been obtained for 346.06 feet, which is less than a majority and is insufficient and we therefore recommend that no license be issued.

Very truly yours,

ROBERT C. O'CONNELL,
Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,
Acting Corporation Counsel.

Rights of City to Strip of Land Known as South Kilbourn Avenue.

May 10, 1922.

JOHN D. RILEY, Superintendent, Bureau of Maps and Plats.

Dear Sir:

Your letter of November 18, 1921, in reference to the rights of the City of Chicago in the strip of land known as South Kilbourn avenue, lying between the C. B. & Q. R. R. and West 26th street, together with a copy of the letter dated November 3, 1921, from the Chicago Title and Trust Company addressed to Mr. H. J. Haenisch of the Bureau of Compensation in relation to the status of the above strip of land, have been received, and in accordance with your request for an opinion on the entire subject matter, I submit the following:

I have made a careful search of the facts as presented in the said letter of the Chicago Title and Trust Company and learn that they are substantially correct.

In the year 1897 and some time prior thereto there was a special assessment case, No. 19396, pending in which the C. B. & Q. R. R. Company was assessed \$4,314.70 for the property in question and other property to be benefited. In consideration of the said sum of \$4,314.70, to which the city was entitled, but in reality never received, the C. B. & Q. R. R. Co., by an agreement with the City of Chicago, dated November 2, 1896, and recorded April 15, 1897, in Book 5900, page 98, as Document No. 2523652, granted to the City of Chicago the right to construct and maintain a sewer. The agreement in part contains the following provision:

“grants, quit claims and conveys to the party of the second part (City of Chicago) a right of way for the construction, operation and maintenance of a sewer nine feet * * * in diameter through a strip of land within the street lines of West 45th street (now South Kilbourn avenue) *proposed to be opened through land* described as follows: (property in question and other property).”

“And the said party of the second part (City of Chicago) agrees that until said street shall be legally opened, the said sewer shall in nowise interfere with the use of the surface of said land and that the premises

shall be left in as good condition at the completion of said sewers as they are now. * * *''

The agreement further provided that nothing contained in the said agreement shall in any way or manner abridge the right of the C. B. & Q. R. R. Co. to lay additional tracks over and across the right of way conveyed, and that the work of construction, maintenance and repair of said sewer shall be carried on in such manner and at such times as not to damage the property of the said railroad or to interrupt the operation of its railroad.

It further appears from the records in the recorder's office of Cook County that up to the date of the aforesaid instrument there had been no action by the City of Chicago whereby it acquired the fee or easement in the street in question. Legal proceedings had been started in 1892 but in 1908 the judgment was vacated and the petition dismissed. Therefore, the petition to condemn was never consummated and the City of Chicago obtained no rights in said strips of land by virtue of the aforesaid proceedings.

A further examination of the records shows and indicates that there was no subdivision or plat filed at any time from which an easement might be inferred on behalf of the city. No facts are shown in the records that disclose a right in the city, but on the contrary, from the agreement referred to above, it clearly appears that as far back as 1896, the city expressly admitted that it had no right to the strip of land in question. Further evidence that the city tacitly admitted that it had no right in the said strip is manifest by the petition that it filed in 1892 to condemn the said strip of land. The mere fact that a petition is filed to condemn land for a street does not in itself represent that the petitioner has no right in the said strip for highway purposes, but is at least *prima facie* evidence of the absence of any legal right.

Therefore, in view of the existing facts aforesaid, particularly the filing of the petition by the city to condemn the strip of land in question for a street and the subsequent dismissal thereof, and furthermore, the agreement between the City of Chicago and the C. B. & Q. R. R. Co., I am of the

opinion that the City of Chicago has no rights, except the right to construct and maintain a sewer as stated in the agreement aforesaid, in and to the strip of land known as South Kilbourn avenue, lying between the C. B. & Q. R. R. Co. and West 26th street, and that it is private property.

Yours very truly,

HARRY F. CHAVERIAT,
Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,
Acting Corporation Counsel.

Liability of City in Motorcycle Accident.

May 16, 1922.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

In reply to your request for an opinion relative to the liability of the city in an accident whereby George W. Moore, was struck by a motorcycle operated by Lieutenant A. G. Smith, on May 10, 1922, at State street and Jackson boulevard, permit us to say that for the reasons hereinafter stated we are of the opinion that the city is not liable on such a statement of facts.

The law is well settled that a policeman acting in the discharge of his duties is acting as an agent of the state and not as an agent of the city, and therefore the city is not liable for any tort or negligent act of the police officer occurring in the performance of his duty.

Wilcox v. City of Chicago, 107 Ill. 334.

Culver v. City of Streator, 130 Ill. 238.

Craig v. City of Charleston, 180 Ill. 154.

City of Chicago v. Williams, 182 Ill. 135.

Johnston v. City of Chicago, 258 Ill. 494.

In the case of *Culver v. Streater*, *supra*, our Supreme Court said:

“Police officers appointed by the city are not its agents or servants so as to render it responsible for their

unlawful or negligent acts in discharging their duties.
 * * * The ground upon which the foregoing cases and many others of a like nature are admitted as exceptions to the general rule of corporate liability is that in those matters the city acts only as the agent of the state in the discharge of duties imposed by law for the promotion and preservation of the public and general welfare as contra distinguished from mere corporate acts having relation to the management of its corporate or private concerns, and from which some such or immediate advantage or emolument in its corporate or private carriage.

“The police regulations of a city are not made or enforced in the interest of the city in its corporate capacity, but in the interest of the public. A city, therefore, is not liable for the acts of its officers in attempting to enforce such regulations.”

The law is therefore well settled that the city is not liable for negligent acts of its police officers, and we are therefore of the opinion that the city is not liable on this claim.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Liability of City for Accident Caused by Signal Service Wagon.

May 16, 1922.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

In reply to your request for an opinion relative to the liability of the City of Chicago for an accident in which Wilbur Giermann, 727 N. Racine avenue, was struck by signal service wagon of the 25th District driven by Patrolman Edward Flathau and in charge of Patrolman Claude Alexander at Racine and Chicago avenues, April 12, 1922, permit us to say that in our opinion the city is no wise liable on such a state of facts for the reasons hereinafter stated.

The law is well settled that a policeman acting in the dis-

charge of his duties is acting as an agent of the state and not as an agent of the city, and therefore, the city is not liable for any tort or negligent act of the police officer occurring in the performance of his duty.

Wilcox v. City of Chicago, 107 Ill. 334.

Culver v. City of Streator, 130 Ill. 238.

Craig v. City of Charleston, 180 Ill. 154.

City of Chicago v. Williams, 182 Ill. 135.

Johnston v. City of Chicago, 258 Ill. 494.

In the case of *Culver v. Streator*, *supra*, our Supreme Court said:

“Police officers appointed by the city are not its agents or servants so as to render it responsible for their unlawful or negligent acts in discharging their duties. * * * The ground upon which the foregoing cases and many others of a like nature are admitted as exceptions to the general rule of corporate liability is that in these matters the city acts only as the agent of the state in the discharge of duties imposed by law for the promotion and preservation of the public and general welfare as contra distinguished from mere corporate acts having relation to the management of its corporate or private concerns, and from which some such or immediate advantage or emolument in its corporate or private carriage.

“The police regulations of a city are not made or enforced in the interest of the city in its corporate capacity, but in the interest of the public. A city, therefore, is not liable for the acts of its officers in attempting to enforce such regulations.”

The law is therefore well settled that the city is not liable for negligent acts of its police officers, and we are, therefore, of the opinion that the city is not liable on this claim.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Permission to Private Firm to Erect Street Lights.

May 23, 1922.

HON. GUY MADDEROM, Alderman of the 9th Ward.

Dear Sir:

Replying to your request for an opinion as to the legality of granting permission to a private firm to erect street lights upon city streets, using them for the subsidiary purpose of advertising, permit us to say that we believe it is not possible for such permission to be granted. We are enclosing a copy of the ordinance which regulates the erection and specifications of all lamp posts and street lights within the city. Your attention is particularly called to Section 2 of the same which reads as follows:

“Section 2. All electric lamp posts shall conform *in appearance* with the drawings marked No. 1, No. 2, No. 3 and No. 4, respectively, which are attached to and hereby made a part of this ordinance, and which shall be the design for the posts classified and correspondingly numbered in the preceding section. *All such posts shall also conform in all details to the following specifications*, which are hereby adopted as the standard for electric lamp posts to be used in the public streets of the city, whether the same are installed or used by the city or by any other person or corporation.”

In view of this provision, we believe the City Council has clearly expressed the intention that all lamp posts shall conform in appearance with the enclosed drawings, and since any advertisement placed upon these posts would alter the appearance and specifications, we believe it is not within the power of the street department to allow such advertisement. This permission could not be granted by a special ordinance because, since there is already a general ordinance covering the same subject matter, any special ordinance granting a right to erect such advertising would be special legislation and unconstitutional.

It is not clear, from the facts stated in your letter, whether the advertisements are to be attached to the post itself, or to be a separate structure located in close proximity to the post. However, if it is the latter, the City Council still

could not legally grant the permission to erect them, for it is well settled that the city may not delegate any power or right to use a public street for exclusively private purposes and the erection of a separate structure in the street for the use of advertising, to be illuminated by the lamp post would be an obstruction placed in the street for an exclusively private purpose. Thus, our Supreme Court, in the case of *Hibbard, Spencer & Bartlett v. City of Chicago et al.*, 173 Ill. 91, at page 96, said:

“The public streets of a city are dedicated to the public for public use and are subject to the control and management of the City Council, but that body has no power to alien or otherwise encumber such streets so long as they are public streets, but must hold them in trust for public uses only. The municipal corporation can grant no easement or right therein not of a public nature, and the entire street must be maintained for public use, hence no individual or corporation can acquire any portion of the street for exclusive private use to the exclusion of the public. The City Council has no power to grant such use. (*Field v. Barling*, 149 Ill. 556.)

For the foregoing reasons we are of the opinion that neither the city nor the Department of Streets can give its consent to erecting such street lights.

Respectfully submitted,

A. H. VEEDER,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Pension for Fractional Part of Month.

May 23, 1922.

RETIREMENT BOARD OF THE MUNICIPAL EMPLOYEES' ANNUITY
AND BENEFIT FUND, Chicago, Illinois.

Gentlemen:

Replying to your request for an opinion as to whether or not the widow or heirs at law of a municipal employe who retired on annuity under the Act of 1921 are entitled to

payment for the fractional part of the month that elapsed from the date of the last payment to the date of death, I desire to advise you that Section 15 of the Act providing for the creation, setting apart, maintenance and administration of a municipal employees' annuity and benefit fund, approved June 29, 1921, in force July 1, 1921, provides that an annuity to be known as age and service annuity shall be provided for future annuitants and for present employees, and that such annuity shall consist of equal monthly payments for life, and that the first payment shall not become due and payable until one month after the occurrence of the event upon which payment of such annuity shall depend. If an annuitant should die before the expiration of one month from the time of the granting of his annuity, neither his widow nor his estate would have any right to collect for the fraction part of the month that the annuitant had lived.

It is clear from the Act that the Legislature intended the annuity to be paid to the annuitant at stated monthly periods, and that an entire month would have to elapse before the annuitant would have any claim to the annuity.

It is, therefore, my opinion that the widow or heirs at law of an annuitant have no claim to payment for the fractional part of the month that may have elapsed from the date of the last payment to the date of the death of the annuitant.

Yours truly,

JAMES W. BREEN,
Acting Corporation Counsel.

Location of First Ward Office and Yard.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

We are in receipt of your letter of inquiry concerning the location of the proposed new First Ward Office and Yard, which you would like to place on a portion of the lower level of the roadway of Michigan avenue and a portion of the

roadway of East Lake street between Michigan avenue and Beaubien court.

You state that the purpose of the structure you intend to erect is to take care of the street cleaning equipment and to transact the business relating thereto and to other activities of the ward. The portion of Lake street on which the building is to be located is on about the same level as the lower roadway on Michigan avenue, but there is no street overhead, so that, with respect to this part of the structure, it will be located on the street although at so low a point that it will not be in sight of the people passing on Michigan avenue. Your question is whether such location may be legally used for this purpose.

An examination of the premises in question discloses the fact that the portion of the lower level of Michigan avenue which you propose to use is so little used by the public that owners of private automobiles are using it almost continuously for parking purposes. If it were not for the question whether its use for the purposes you indicate would cut off a part of Lake street as a thoroughfare there would be no doubt whatever of the City's right upon the passage of a proper ordinance by the City Council, to use the lower level of Michigan avenue which you have indicated, since such use would not conflict or interfere with the use of the upper level of Michigan avenue for street purposes. It may be said incidentally that the portion of Lake street which is to be used for this purpose is also taken up for parking space at present, but this does not affect the situation.

The only question to be determined, therefore, is whether there is an inconsistent use of Lake street or an interference with the free use of Lake street both before reaching Michigan avenue and at Michigan avenue. To decide this question it is necessary to revert back to the purpose for which the property now used as Lake street at this point was acquired.

The rule with respect to land dedicated for a public purpose is that any use inconsistent with, or substantially or materially interfering with, the use of the property for the particular purpose to which it was dedicated constitutes a

nuisance or diversion which might result in the property being taken from the municipality.

18 *Corpus Juris*, 128.

Dillon on Municipal Corporations (5th ed.), Sec. 1103, *et seq.*

Village of Riverside v. MacLain, 210 Ill. 308.

In the present instance there was no dedication in the sense that the term is ordinarily used. The record we have on the opening of Lake street begins by a letter of Alex. Macomb, Major General Acting in Chief, which reads as follows:

“Headquarters of the Army, Washington, May 9, 1837.

“Sir:

“Your letter of the 17th ultimo, addressed to the Adj. Genl. concerning the petition of the authorities and citizens of Chicago, praying that the streets of the town terminating at the commencement of the military reservations may be continued to the lake, has been received. I lost no time in bringing the matter to the consideration of the Secretary of War, and agreeing with you as to the propriety of allowing a way to the lake by Lake street continued. I have obtained his consent thereto, conditioned, that the town put up the fences on both sides of the street at its own expense, and also, that the Government, at any time, may close the same if the public good in its opinion should require it.

“It is hardly to be expected we shall again occupy the whole of the grounds reserved for military purposes, and as it would be unreasonable to impede the growth of the town by preventing the inhabitants getting to the lake by the extension of the streets in that direction, I have to request, that you will report for the information of the Secretary of War on the propriety of selling the whole, or any part, of the reservation—the light house, of course, will require some portion of the land, as well as the public pier, which you will notice in your report.

“I am sir, &c, &c, &c,

Signed

Alex. Macomb,

Major Genl. Acting in Chief.

Major I. Plympton,

5th Infantry,

Fort Dearborn, Ill.”

After the above letter was received the street was opened up. The street was afterwards shut off in such a way that the clause with reference to "impeding the growth of the town by preventing the inhabitants from getting to the lake" has a strange aspect. But since, with all the litigation that has gone on concerning the lake front, the street has not reverted back to the government on account of this, we believe we are safe in saying that it will not go back when it is used for a public purpose such as you desire to put it to.

We are therefore of the opinion that the property may be used for the purposes of the Department of Public Works in the manner outlined by you.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Permit for Remodeling Place of Amusement.

May 24, 1922.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

Replying to your request for an opinion as to whether or not a permit should be issued by you to enable the Morrison Hotel to remodel the premises now used by them for public amusement purposes, we desire to advise you that it appears from the plat and sketch submitted to us that there are now and have been for some time two places of public amusement conducted by the Morrison Hotel in buildings separated by a partition wall, each of the places having a seating capacity of less than 400.

The hotel now desires to consolidate both amusement places into one place of amusement with a seating capacity not in excess of 700.

Under the Building Code of the City it is unlawful to build a theatre of ordinary construction material with a seating capacity of more than 300. The building in ques-

tion not being a new one, but having been in existence for a number of years prior to the passage of the present building ordinance, the primary object of the ordinance must be considered. We are satisfied that every one will agree that the primary object of the particular ordinance in question is a desire to safeguard life and reduce the hazard in buildings erected for theatres after the passage of the ordinance. When this ordinance must be considered in connection with buildings used for theatres which were constructed prior to the passage of the ordinance, you, as building commissioner, are vested with wide discretion. Under the present arrangement at the places of public amusement in the Morrison Hotel, two moving picture machines are used for the purpose of entertaining the public in two buildings separated by a partition wall. Under the proposed remodelling scheme they propose to consolidate these two places of public amusement so that it will only be necessary to use one moving picture machine. The hazard to the public will be thus reduced in this particular 50 per cent.

It is our opinion that where a theatre in a building of ordinary construction is remodelled and improvements made therein which will greatly reduce the hazard, it is your duty, under the law, to co-operate and issue the necessary permits to bring about such a condition. From an examination of the sketch of the proposed remodelled theatre, it appears that fireproof passages will be constructed and other modern improvements installed which, I must concede, will result in greatly reducing the danger of accidents.

It is therefore our opinion that it is your duty to exercise the discretion vested in you by law and issue the permit necessary to permit such remodeling, and thus minimize the danger of accidents in a public place of amusement in a building erected prior to the passage of the present ordinance.

I return plat and sketch herewith.

Yours truly,

JAMES W. BREEN,
Acting Corporation Counsel.

Extension of Municipal Credit for Construction of Private Homes.

May 24, 1922.

HON. EDWARD J. KAINDL, Chairman Committee on High Costs and High Rents.

Dear Sir:

In response to your request for an opinion as to whether it would be lawful, without a constitutional amendment to that effect, to put into effect legislation permitting the state or a municipality to make loans to people of modest means in order to enable them to build homes, we call your attention to Section 20 of Article IV of the Constitution, which reads as follows:

“The state shall never pay, assume or become responsible for the debts or liabilities of, *or in any manner, give, loan or extend its credit to or in aid of* any public or other corporation, association or individual.”

Under the above section the General Assembly is prohibited from authorizing such loans as are here contemplated. Since it does not itself possess the power to do this, it follows that it cannot delegate such power to a municipality.

It will, therefore, be necessary either to amend our present constitution or to secure an addition to the proposed new constitution in order to accomplish such a result as the resolution submitted to us aims to bring about.

The Constitutional Convention adopted, after considerable debate, a provision authorizing the making of farm loans. The passage of this proposition indicates that the members of the convention would at least have been in a receptive mood in case a proposition to make loans for home building purposes had been submitted to them.

Whether or not it is now too late to get the Constitutional Convention to take up the matter is problematical. The convention will not re-assemble until June 13th, and it has been assumed that it will not take up new propositions at that time, but only round out its work by passing the schedule that is being prepared and then adopting the constitution as a whole.

We recommend, however, that inasmuch as the constitution is still in the making, if it is the desire of the City Council to take action along the lines indicated an effort ought to be made to get the convention to consider such a proposition.

Yours truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,
Acting Corporation Counsel.

Frontage Consents as Affected by Building Under Construction.

May 25, 1922.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

Your communication of May 24, 1922, in reference to the application of Edward Traub for a license to operate a laundry at 6708 Edison Park avenue, has been referred to me for an opinion.

In order to determine whether or not the applicant is entitled to a license, without frontage consents, it must be determined whether or not a building now under construction, which is designed for a store and apartment building, should be considered by the commissioner.

There are, exclusive of this building under construction, an equal number of residential and business buildings in the block where the laundry building is located, and it becomes very material whether or not the building under construction should be counted.

The courts have passed upon the definition of the meaning of the word "building" as used in ordinances such as the one under consideration. A building is defined in 9 Corpus Juris 685:

"A fabric or edifice such as a house, church or the like, and designed for the habitation of man or animals or for the shelter of property."

The Appellate Court of Illinois, in *Sacks et al. v. Legg*, 219 Ill. App. 144, at page 147, said in reference to a building:

“Taken in its broadest sense, it can mean only an erection intended for use and occupied as a habitation or for some purposes of trade, manufacture, ornament or use constituting a fabric or edifice such as a house, a store, a church, a shed.”

It is my opinion that, if you are satisfied that the building in question is intended to be used in part as a store building, it is your duty, under the law, to approve the application for the license in question.

Very truly yours,

ALBERT S. O’SULLIVAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Legal Effect of Council Order Concerning Street Carnivals.

May 27, 1922.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

In compliance with your verbal request that we render you an opinion as to whether or not it was mandatory for you to comply with an order passed by the City Council on May 3, 1922 (page 136 of the Journal of the Proceedings of the City Council of said date), we advise you as follows:

Said order read as follows:

“Ordered, That the Superintendent of Police and the Commissioner of Public Works be and they hereby are directed not to issue any permit or permits for the operation of a street carnival or for the operation of a merry-go-round, ferris wheel or like device anywhere within the limits of the City of Chicago without first obtaining the consent to the issuance of any such permit from the aldermen of the respective wards in which it is proposed to conduct any such street carnival or to operate a merry-go-round, ferris wheel or like amusement device.”

In the case of *Hibbard, Spencer, Bartlett & Company v. City of Chicago, et al.*, 173 Ill. 91, our Supreme Court said as follows:

“An ordinance of the city can only be repealed or amended by an ordinance of the city. A mere resolution or order by the City Council, not passed and published as an ordinance of the city, would not constitute a repeal of an ordinance duly passed.”

Also in the case of the *Chicago and Northern Pacific Railroad Company v. the City of Chicago*, 174 Ill. 439, the Supreme Court said:

“But an ordinance cannot be amended, repealed or suspended by a resolution. The act which amends, modifies or repeals a law should be of equal dignity with the act which enacts or establishes the law. A resolution or order is not law, but merely the form in which the legislative body expresses an opinion. An ordinance prescribes a permanent rule of conduct or government while a resolution is of a special and temporary character. Acts of legislation by a municipal corporation, which are to have a continuing force and effect, must be embodied in ordinances, while mere ministerial acts may be in the form of resolutions.”

In view of these decisions we advise you that if the applicants for licenses have complied with the provisions of the ordinances of the city regulating amusements, for which licenses have been applied for, that you are not bound to obey the above mentioned order of the City Council.

Yours very truly,

FRANK W. DERBY,

Approved: *Assistant Corporation Counsel.*

SAMUEL A. ETTELSON,
Corporation Counsel.

Status of City Firemen Under Workmen's Compensation Act.

May 29, 1922.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

Your request for an opinion on the status of city firemen under the Workmen's Compensation Act and its effect

on special appropriations made for medical attention, pensions and other matters, was referred to the undersigned for consideration and reply.

From the report of the city attorney which was attached to your letter it appears that in the case of John Burke, who was a city fireman killed by the falling of a wall at a fire, the widow made a claim against the city under the Workmen's Compensation Act, and her claim was upheld by the courts.

A question has arisen whether, in view of this decision, the fund provided for hospital and medical expenses of injured city employes "who are not included within the provisions of the Workmen's Compensation Act" can be used for such expenses of an injured fireman. Another question involved is the matter of pay of an injured fireman while incapacitated for duty. There are also other questions relating to pensions, insurance, etc., which you ask us to go into so that you may have the whole matter before you.

There can be no doubt whatever of the right of the City Council to make the provision for payment of full compensation while a fireman is incapacitated, or for the payment of hospital and medical expenses, if the appropriations therefor are properly drafted. It will be necessary to change the appropriation, as it now stands, for hospital and medical service, in order to accomplish this.

The portion of the Workmen's Compensation Act that is involved is the first part of Section 5, which reads as follows:

"§ 5. The term 'employee' as used in this act, shall be construed to mean:

"*First*—Every person in the service of the state, county, city, town, township, incorporated village or school district, body politic or municipal corporations therein, under appointment, or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, town, township, incorporated village, school district, body politic or municipal corporation therein: *Provided*, that any such employee, his personal representative, beneficiaries or heirs, who is, are or shall be entitled to receive a pension or benefit for or on account of disability or death arising out of or in the course of his employment from a pension or benefit fund

to which the state or any county, town, township, incorporated village, school district, body politic or municipal corporation therein is a contributor, in whole or in part, shall be entitled to receive only such part of such pension or benefit as is in excess of the amount of compensation recovered and received by such employee, his personal representative, beneficiaries or heirs under this act." * * *

The question of whether a policeman was or was not an "officer" or "official" within the meaning of some particular statute has frequently arisen and has been the subject of much controversy. That question was raised with reference to the statute under consideration in the case of *City of Chicago v. Industrial Commission*, 291 Ill. 23 (also known as the Coyne case). It was the only question in that case. The court held that a policeman must be regarded as an official within the meaning of that term as used in Section 5 above quoted, and gave its reasons for such decision.

It is not often that the same kind of question arises in the case of firemen. Their status in the first instance is different, and there has been no attempt made by the City Council at any time to change their positions from employees to officers.

Nevertheless, so far as this particular law is concerned, the City Council has treated firemen just as it has treated policemen—as if they were officers that were not included within the provisions of this act. Full pay is given to them while disabled when such disability results from the discharge of their duties, and special provision is made for paying their hospital and medical expenses.

In some respects the Legislature has also placed firemen on the same basis as policemen. Special provision is made for a separate pension fund for firemen, as in the case of policemen, and the law now permits the City Council to insure policemen and firemen so as to provide payment up to \$5,000 for their families in case of violent or accidental death.

In the Burke case, reported to you by the city attorney, the city undertook to defend the claim of the widow under

the Workmen's Compensation Act on the theory that a fireman, like a policeman, was an "official." The case was decided against the city on this point by the Industrial Commission, and this decision was confirmed by the Circuit Court. The city then presented the matter to the Supreme Court, urging the same point, on a petition for a writ of error, in accordance with the method of procedure prescribed by the act. The Supreme Court denied the petition. Its refusal to grant a writ of error amounts to a holding that a fireman is not excluded by the language of the act from the benefits thereunder, or in other words, that a fireman cannot be regarded as an "official."

Although the treatment accorded firemen would seem to indicate that both the General Assembly and the City Council regarded them as practically on the same plane, there never was any good reason for assuming that the language of the exception related to firemen, or that they were excluded from the benefits of the Workmen's Compensation Act as being "officials" instead of "employees." The decision of the Supreme Court should therefore occasion no surprise.

Since firemen must be understood as covered by the act, it follows that the fund for hospital and medical expenses which the City Council has appropriated for employees who are not included within the provisions of this act cannot legally be used for such expenses of injured firemen. It will require specific mention of firemen if such an appropriation is to be made for them, and such appropriation for the current year will have to be made from miscellaneous receipts. It is also plain that whatever sum is awarded a fireman or his heirs under the Workmen's Compensation Act must be deducted from the pension or benefit fund, as in the case of all other city employees.

We are of the opinion that the recovery of compensation under the Workmen's Compensation Act will not deprive the members of a fireman's family of their rights to the allowance or insurance provided in the case of violent or accidental death, although from the language of the act quoted above it will be seen that this point is not entirely free from doubt. It may be contended that the words "pension or

benefit fund'' are susceptible of such definition and it may require a court decision to settle the point, but the likelihood of a finding by the courts that such allowance or insurance comes within the meaning of these words is very remote.

There is, as we have stated, nothing which will prevent the City Council, if it sees fit, from providing that firemen shall receive full pay during the period when they are incapacitated by reason of injuries sustained while in pursuit of their duties. This would probably be construed as in the nature of a pension or benefit fund from which the allowance provided for by the act would have to be deducted. In fact, it would almost seem as though it must be so construed, otherwise such an allowance would be a gratuity and therefore unlawful.

The city attorney throws out the suggestion that the matter can be adjusted by an amendment to the Workmen's Compensation Act so as to specifically exclude city firemen from its provisions. This might appeal to the City Council as the best thing to do, but it should be remembered that even if the Legislature were to pass such an amendatory act it will take more than a year before such amendment will be in effect.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Use of Jones School Property for Central Police Station.

Chicago, May 31, 1922.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

We are in receipt of your letter in which you ask whether an arrangement could be made by which parties constructing a central police station and municipal court building on school property could be adequately secured while the city is paying for such building.

Some time ago we stated, in an opinion regarding such a structure, that if you could secure a party to furnish the site and erect a suitable building it could be paid for by the city on the installment plan.

A member of a law firm representing the parties who are considering this project discussed the situation with the writer and agreed with us on the main question, but called attention to the fact that our opinion was written on the theory that these parties would furnish both site and building, and that since then a site was determined upon at Harrison street and Plymouth court, known as the Jones school property, which belonged to the city in trust for the use of schools.

The question now arises whether payment could be assured to these parties in case they do not own and retain title while the city owes the money, or, if that is not feasible, what can be done to secure them in the absence of either a bond issue or an appropriation for the full amount.

In our former opinion we gave our reasons for saying that Section 3 of Article VII of the Cities and Villages Act authorizes the making of a contract for an improvement extending over a number of years where there has been an appropriation made which is available for the current year, and the City Council has definitely decided on the nature and extent of the improvement.

The conclusion we arrived at was that the city would be bound by such a contract, and the party who contracted with the city would be secured thereby. There has not been any decision on this point by any of the reviewing courts of this state, so far as we know, and therefore we are not able to point to such direct authority as may be demanded by a person who makes a large investment.

In the absence of either a bond issue or an appropriation in full for the entire improvement, if the contracting party is not satisfied with such an arrangement there is apparently only one other way in which he can be fully secured. That is by the city's alienation of the property on which the building is to be erected, its acquisition by the party erecting the building, and a contract providing for rental and its restoration by deed to the city at the end of the term,

The law permits the city to sell property when the same is no longer "necessary, appropriate or required for the use of such city, or profitable to, or its longer retention be for the best interests of, such city." (Act of June 27, 1917, Sec. 1.) This provision applies to school lands, so far as the method of disposing of property is concerned, although Section 133 of the School Act requires the Board of Education to take the initiative and to make a request for such sale to the City Council by a vote of three-fourths of its full membership.

As the property now stands, there is no doubt that it is of very little value for school purposes, and its sale to a party who desires to erect such a building as is proposed would be entirely lawful.

We suggest, therefore, that there are two ways in which the proposed improvement can be secured, and that it is only a question of which of the two methods will be satisfactory to the parties who will construct the building.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Medical Expenses of Private Citizen Shot While Assisting Police Officer.

June 1, 1922.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

In response to your request for an opinion relative to whether, where a private citizen has been asked by a police officer to guard the door of a place that is being burglarized (or otherwise assist in the capture of a burglar), and in the course of such duties is, through an error, shot by another policeman, such citizen can be legally considered to have had police power for that particular time and place, and whether

the city can pay for his hospital and medical expenses occasioned by the wounds thus received, permit us to say :

It is an old, established principle of the common law that a sheriff, police officer or other conservator of the peace, in making an arrest, has the right to call to his assistance any citizen or such number of citizens as he deems necessary.

Section 3 of Division VI of The Criminal Code of Illinois reads :

“Every male person above the age of eighteen, when commanded by an officer to assist in arresting or securing an offender, shall obey such command.”

Section 245 of the Criminal Code provides a fine of from \$10 to \$50 for refusal to thus assist an officer when thereunto lawfully required.

While persons thus called to the assistance of an officer are not themselves, technically, officers, yet their powers for the time being, in connection with the business at hand, are as broad as those of the officer who called them.

Main v. McCarty, 15 Ill. 442.

In 5 Corpus Juris, 428, we read :

“A peace officer has the right to summon and require the assistance of as many bystanders as may be necessary to enable him to perform his duty in making an arrest or preventing or suppressing a breach of the peace. * * * One who has been duly summoned is under the same protection of the law which is afforded an officer. * * * Persons orally deputed by the sheriff to assist him in making an arrest for felony *are neither officers nor private persons* while co-operating with the sheriff and acting under his orders, but their legal position is that of a *posse comitatus*.”

In view of the above authorities, we are of the opinion that a person, commanded to assist an officer in making an arrest, is for the time being, undoubtedly clothed with police power.

But while a police officer has a common law, as well as a statutory, right to call a private citizen to assist him, and thereby clothe him for the time being with police power, he has no authority to promise him any compensation, or incur

any liability in behalf of the city in that regard, without being thereunto authorized by the City Council. If, however, the service rendered by such citizens were of an extraordinary character, such as he might reasonably expect to be paid for, we know of no rule of law that would prevent the City Council from paying him a fair and reasonable compensation, if it sees fit. In the absence of such appropriation, however, he would not, in our opinion, have any legal claim against the city.

In the present case, it appears that the claim presented arises out of a supposed *tort* committed by a city policeman, who shot the claimant under the mistaken idea that he was the burglar. As we have heretofore frequently advised you, a city is not liable for any wrongful acts committed by its policemen, but the remedy of the party injured is an action against the officer who committed the offense.

Wilcox v. City of Chicago, 107 Ill. 334.

Culver v. City of Streator, 130 Ill. 238.

Craig v. City of Charleston, 180 Ill. 154.

City of Chicago v. Williams, 182 Ill. 135.

Johnston v. City of Chicago, 258 Ill. 494.

But in view of the fact that the City Council has provided an appropriation for the payment of doctors' bills and medical attendance of policemen who are sick, regardless of whether their illness is in any manner due to any fault of the city, we believe that the illness of the party here in question would properly come under the same rule and that his hospital and medical expenses may properly be paid out of the appropriation above mentioned.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Liability of City for Damages to Automoblie.

June 6, 1922.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Replying to your request for an opinion in the claim of Mr. William F. Matthias, for damages to his automobile sustained on November 29, 1921, on Indiana avenue at 72nd street, we beg to advise you that for the following reasons we believe the city is not liable for this claim.

The following is the report of the superintendent of the 7th Ward:

“Mr. Thos. H. Byrne,

Supt. of Streets.

Dear Sir:

“Replying to attached letter would say that permits No. D-3865 and D-3311 were issued to the Bureau of Sewers and street was opened by them for repairs. This is an asphalt pavement and opening was filled up from time to time and made safe. Permanent repair has not been made as yet or until asphalt-gang reaches ward. At no time to the best of my recollection was this opening dangerous and would be safe for passage using ordinary care.

Yours respectfully,

John Blank,
Supt. 7th Ward.”

Assuming the above facts to be true, we believe that any damage which happened to the automobile of the said W. F. Matthias must have been due to his failure to use ordinary care.

The law is well settled in Illinois that any person using the streets must exercise the ordinary care which a reasonable prudent person would exercise. Thus the Supreme Court, in the case of *City of Spring Valley v. Gavin*, 182 Ill. 232, at p. 235, where the court was considering the liability of the city for an accident to a person using a public street, said:

“The law is well settled in this state, that where an injury is not willful a party cannot recover for the injury received, unless it appears, from the evidence, that he exercised ordinary care.”

For these reasons we believe the city is not liable in this claim.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

By-Laws of Retail Fish Dealers Association as Restraint of Trade.

June 8, 1922.

HON. EDW. J. KAINDL, Chairman, Committee on High Costs and High Rents.

Dear Sir:

In response to your request for an opinion relative to whether the provision in the by-laws of the Retail Fish Dealers' Association that no two fish stores can be conducted within 2,000 feet of each other is in restraint of trade, permit us to say:

Section 11 of said by-laws (or constitution) reads as follows:

"Each and every member agrees not to conduct a fish market within a radius of 2,000 feet from any other member of the association nor work or to become interested directly or indirectly in any manner or capacity whatever in any fish market within the radius of said 2,000 feet."

If the purpose of this section is to stifle competition—and we can see no other purpose in it—we have no hesitancy in saying that it constitutes an agreement in restraint of trade. And, generally speaking, all agreements in restraint of trade were illegal at common law, and are still unlawful. The only exception recognized by the law, is the case where an individual tradesman sells out his business and the *good will* thereof; in order to deliver such *good will of the business* to the vendee, the vendor may lawfully bind himself not to engage in a competing business, for a *limited time*, or within a

limited area. With this exception, however, agreements in restraint of trade are unlawful.

In the case of *More v. Bennett*, 140 Ill. 69, an association known as the Chicago Law Stenographers Association had been formed, and a certain by-law adopted, by the terms of which the members of the association bound themselves not to compete with each other, in the matter of rates or otherwise, though they might compete with non-members as much as they chose. The Supreme Court held that such by-law constituted an unlawful agreement in restraint of trade. After referring to several adjudicated cases, the court said:

“Counsel seek to distinguish this case from those cited, by the circumstance alleged in the second count of the declaration, that but a small portion of the law stenographers of Chicago belong to said association. An analogy is thereby sought to be raised between the contract in this case and those contracts in partial restraint of trade which the law upholds. We think the analogy thus sought to be raised does not exist. Contracts in partial restraint of trade which the law sustains are those which are entered into, by a vendor of a business and its good will, with his vendee, by which the vendor agrees not to engage in the same business within a limited territory, and the restraint, to be valid must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased. But in the present case there is no purchase or sale of any business, nor any other analogous circumstance giving to one party a just right to be protected against competition from the other. * * * The object of the association is purely and simply to silence and stifle all competition as between its members. No equitable reason for such restraint exists. * * * The restraint is not so far reaching as it would have been if all the stenographers in the city had joined the association, but so far as it goes, it is precisely of the same character, produces the same results, and is subject to the same legal objection.”

In the case of *Chicago, Wilmington and Vermilion Coal Co., et al. v. People*, 214 Ill. 421, a number of coal companies had been indicted in the Criminal Court of Cook County for conspiracy to do an illegal act, injurious to the public trade,

namely, to regulate and fix the price at which coal should be sold in the State of Illinois. The Supreme Court, in affirming a judgment of conviction, said:

“A combination between independent producers of coal *to prevent competition in the sale of that article*, which is a necessary of life, is an act inimical to trade and commerce and detrimental to the public and unlawful, and *amounts to a common law conspiracy*, regardless of what may be done in furtherance of the conspiracy.
* * *

“The fact that the effect of the action of the association was not to give the plaintiffs in error a complete monopoly of the coal trade in the territory in which they sold coal will not relieve plaintiffs in error from the criminal effect of forming said combination. (*More v. Bennett*, 140 Ill. 69; *Foss v. Cummings*, 149 Ill. 353; *Texas Standard Cotton Oil Co. v. Adone*, 15 L. R. A. 598.) In the last case it was held, to render the contract void it is not necessary that it should create a pure monopoly. And in *United States v. Knight*, 156 U. S. 1, it was said: ‘All the authorities agree that in order to vitiate a contract or combination it is not essential that its results should be a complete monopoly. It is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.’ ”

In the case of *People v. Sheldon*, 139 N. Y. 251, the court held that agreements to prevent competition are injurious to trade, and hence unlawful, not because they *necessarily* raise prices unreasonably, but because they constitute a constant temptation to do so. The same was said, in effect, by our Supreme Court in *Harding v. American Glucose Co.*, 182 Ill. 551; and *Distilling Co. v. People*, 156 Ill. 448.

Other cases supporting the principles above stated are:

Craft v. McConoughy, 79 Ill. 346.

Foss v. Cummings, 149 Ill. 353.

Ford v. Chicago Milk Shippers' Assn., 155 Ill. 166.

Lauzit v. Sefton Co., 184 Ill. 326.

People v. Aachen & Munich Fire Ins. Co., 126 Ill. App. 636.

Richardson v. Buhl, 77 Mich. 632.

Morris Run Coal Co. v. Barclay Co., 68 Pa. 173.

Nester v. Continental Brewing Co., 161 Pa. 473.

Texas Standard Cotton Oil Co. v. Adone, 15 L. R. A. 598.

In our opinion the by-law here under consideration clearly constitutes an agreement in restraint of trade. It certainly tends to stifle competition. That it does not expressly state anything about the raising of prices, is immaterial. That a dealer who has little or no competition is at least *tempted* to raise prices or sell inferior commodities, is well known; and an agreement that has such effect is, under the authorities above mentioned, illegal.

We are of the opinion, therefore, that the by-laws of the Retail Fish Dealers' Association, which provide that no two fish stores can be conducted within 2,000 feet of each other, constitute in law a conspiracy to stifle competition, and are accordingly unlawful.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Deposit of Excavated Material Behind Breakwater.

June 9, 1922.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

We have your letter of even date in which you request us to advise you as to whether or not it would be lawful for you to allow the Great Lakes Dredge and Dock Company to continue to deposit material, which is being dredged by them from the bottom of the lake within the so-called borrowed area, behind the breakwater as at present constructed inasmuch as said breakwater has two openings and is not a water-tight bulkhead.

Section 1130 of The Chicago Code of 1911 as amended January 26, 1914 (page 3762 of the Journal of the Proceedings of the City Council of said date) reads as follows:

"1130. BEFOULING PUBLIC WATERS—DREDGING—PENALTY.) No person shall throw, discharge, dump or deposit, or cause, suffer or procure, to be thrown, discharged, dumped or deposited, in the harbor of the city or anywhere in Lake Michigan within ten miles of the corporate limits, any clay, earth, ashes or other heavy substance or substances, filth, logs or floating matter, or any obstructions, or any refuse matter of any kind or description whatever, unless said material shall be placed inside of a breakwater so arranged as not to permit the escape of such clay, earth, ashes, or other heavy substance or substances, filth, logs or floating matter, or obstructions, or refuse matter into the body of Lake Michigan. No tug owner or captain or other person in charge or command of a tug shall tow, inside the harbor, any dumping scow or like vessel, with or without a collapsible or adjustable bottom loaded with clay, earth, ashes, or other heavy substance or substances, filth, logs or floating matter or obstructions or any refuse matter of any kind or description whatever, unless there is on board at the time of such towing an inspector from the Department of Public Works. It shall be unlawful for any dredge or other machine to cut clay or dredge sand or other material from the bed or bottom of the harbor of the city, unless the person present conducting such work have in his possession a permit in writing from the Department of Public Works, in which permit the location and time occupied in such work shall be specified, and such person conducting such work shall produce such permit on demand of the harbor master or any of his assistants. It shall be the duty of the harbor master to cause the arrest of any person in charge of any tug, scow or dredge who violates any of the provisions of this section, and such person shall be fined not less than fifty dollars nor more than one hundred dollars for every such offense."

That portion of the lake front development ordinance which was passed by the City Council on July 21, 1919 (pages 1000 and 1001 of the Journal of the Proceedings of the City Council of said date) which is material to the matter involved, reads as follows:

"SPECIFICATIONS J.

FILLING BY COMMISSIONERS AND
CENTRAL COMPANY.

"The material used for the filling in or reclaiming

of submerged lands within the boundaries provided for in this ordinance by the Central Company and the commissioners, or either of them, shall consist of sand, earth, clay, cinders, slag, or other material approved by the commissioner of public works of the city, and the general superintendent of the commissioners as to the material disposed on the lands of the Central Company and lands of the commissioners, respectively.

“The filling-in process may be commenced at two or more points and the work shall proceed so as to finish the filling as provided in Clause b of Section 6 of this ordinance. The filling by the Central Company shall be made reasonably uniform with the filling by the commissioners.

“Provided, however, that the Central Company may, if it so elects, entirely complete the filling in of its lands in advance of the line of fill being maintained by the commissioners, but in such event the eastern line of the filling by the Central Company shall be finished to the uniform line described in Schedule III, being the line between the lands of the company and the lands of the commissioners and shall be left free from any rubbish or other unsightly material.

“All filling shall be retained by suitable bulkheads or other protection, and, should any of the filling used be of a kind that would contaminate the waters of the lake, such filling shall be confined within water-tight bulkheads approved by the commissioner of public works of the city.”

It is a well settled principle of law that where there is a conflict between a general ordinance and a special ordinance that the provisions of the latter shall govern.

We, therefore, advise you that in our opinion you are acting within the law in allowing the Great Lake Dredge and Dock Company to deposit material behind the breakwater, even though the breakwater as constructed, does not form a watertight bulkhead, provided, however, that the material which is to be so deposited, is not of a kind that would contaminate the waters of Lake Michigan.

Yours respectfully,

FRANK W. DERBY,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Order of Discharge for Prisoner Issued by Clerk of Court.

June 13, 1922.

HON. JOSEPH SIMAN, Superintendent of House of Correction.

Dear Sir:

We are in receipt of your communication of the 12th instant, enclosing papers relative to the case of George Williams, who was fined for carrying concealed weapon and sentenced to the House of Correction until such fine should be paid, and who thereafter went into court and acknowledged judgment for the amount of such fine and thereupon demanded his release, which was subsequently obtained by a writ of *habeas corpus*, and we note your request for an opinion as to whether it is your duty to accept an order of discharge issued by the clerk of the court where judgment has thus been acknowledged.

In reply we beg to call your attention to Section 16 of Division 14 of the Criminal Code of Illinois, which reads as follows:

“Section 16. If the person convicted, together with one or more sureties will acknowledge a judgment in favor of the People of the State of Illinois for the amount of the fine and costs or cost only where no fine is imposed, the court shall cause the same to be entered in full satisfaction of the fine and costs or cost only with a direction that if the judgment is not paid within five months from the time of the entering of same, execution shall issue thereon; and the defendant shall upon the entering of such judgment be discharged from imprisonment on account of such fines or costs, but he shall not thereby be discharged from any imprisonment which is made a part of the punishment, not dependent upon the payment of the fine or costs. Such judgment shall be a lien upon all the real estate of the persons acknowledging the same from the date of its entry. If the judgment so entered is not paid within five months from the entry it may be enforced by execution in the same manner as other judgments at law. Such judgment may be acknowledged in vacation before the clerk of the court, and he may in such case approve the surety; and a judgment so acknowledged shall have the same force and effect from the date of the entry as if entered in term time in open court.”

The validity of this section was specifically approved by the Supreme Court in the case of *People v. Horan*, 293 Ill. 314; also by the Appellate Court in *Lambert v. People*, 43 Ill. App. 223.

In view of the above statute and the decisions thereon you will note that wherever a fine merely has been imposed upon a defendant, in a criminal or "state" case, he has the privilege of avoiding imprisonment by either paying his fine or by entering into recognizance or acknowledgment before the court with proper sureties conditioned for the payment of the fine, and he may make such acknowledgment either before he is imprisoned for the non-payment of the fine or after such imprisonment has commenced.

On the other hand, if a defendant is given a prison sentence (and not merely ordered to be confined until his fine is paid) he is not entitled to obtain his release by making such acknowledgment of his debt and giving surety for the payment thereof.

Very truly yours,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Application of Widow of Detective Sergeant for Pension.

June 13, 1922.

TO THE RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY
AND BENEFIT FUND OF THE CITY OF CHICAGO.

Gentlemen:

An examination of the official record in the case of Patrick F. Shannon, detective sergeant in the Department of Police of the City of Chicago, assigned to the 43rd Precinct, who died on the 1st day of April, 1917, discloses that he was appointed and sworn as a policeman, in accordance with the provisions of the city ordinance, on March 10, 1907, and performed the duties of patrol in the Department of Police of the City of Chicago up to and including December 15, 1907,

and thus served as such for a period of nine months and five days. The record also discloses that on December 23, 1907, said Shannon was appointed patrolman in the Department of Police, and served continuously in that capacity from said 23rd day of December, 1907, until the date of his death, viz., April 1, 1917. He thus served an additional period of nine years, three months and nine days, making a total period of service in the Police Department of the City of Chicago of ten years and fourteen days at the date of his death. At the time of his death he held the rank of detective sergeant, and had held said rank for a period of three years, four months and twenty-one days, and was receiving as salary \$1,450 per annum, which was the amount of salary attached to the rank of detective sergeant.

Section 5 of the Police Pension Fund Act, in force and effect at the time of the death of the said deceased Patrick F. Shannon, provides, in part, as follows:

“Whenever any policeman shall die after ten (10) years’ service and while still in the service of such city as a policeman, leaving a widow whom he married more than two months prior to his demise, or natural child or children under the age of sixteen (16) years, then upon satisfactory proofs of such facts made to it, said board shall order and direct that a pension of one-half the salary attached to the rank which he may have held in said police force for one year immediately prior to his death, not exceeding the sum of nine hundred (\$900) dollars shall be paid to such widow or, if there be no widow, then to such natural child or children, until they shall be sixteen (16) years of age, such pension to cease upon the remarriage of such widow, as provided above.”

The only question for the Retirement Board to determine in this case is whether or not the husband of the applicant served as a policeman in the Department of Police of the City of Chicago for ten years prior to his death, and whether or not he died while still in the service of the city as a policeman.

After an examination of the record there is no doubt but that at the date of the death of the husband of the applicant he was in the service of the Police Department of the

City of Chicago as a policeman, and that he held the rank of detective sergeant on the day he died.

With regard to the question as to whether or not the husband of the applicant served as a policeman in the Police Department of the City of Chicago for ten years prior to his death, I desire to call your attention to Section 7 of the Police Pension Fund Act in force and effect in the City of Chicago at the time of the death of the said deceased, which section appears on page 307 of the Laws of Illinois of 1915, and is, in part, as follows:

“Wheresoever the word ‘policeman’ as used in this act appears, the same shall be interpreted and construed to include and mean the following:

“Any person who has been appointed and sworn or designated by law as a policeman, prior to the taking effect of this act, and has served in a regularly constituted police department as a policeman, or police patrol driver and police operator and a member of the police force thereof, and contributed to the Police Pension Fund for such time as he has been in the services of such police department as a policeman, or police patrol driver and police operator.”

After a careful examination of the provisions of the Police Pension Fund Act, in force and effect at the time of the death of the husband of the applicant, it is our opinion that the appointment of Patrick F. Shannon, deceased husband of the applicant, as a policeman in the Department of Police of the City of Chicago, was made on March 10, 1907, on which date he was first sworn in as a patrolman, in accordance with the provisions of the ordinance and the Civil Service Law, and that, for the purpose of computing his service as a policeman in the Department of Police of the City of Chicago, he is entitled to be credited with a period of service commencing March 10, 1907, and ending on the 1st day of April, 1917, making a total period of service of ten years and twenty-one days. From this period of time must be deducted a period of seven days, viz., from December 15, 1907, to December 22, 1907, leaving a net total service of ten years and fourteen days.

In view of the fact that the husband of the applicant served on the Police Department for more than ten years prior to his death, and died while still in the service of the city as a policeman, we recommend that the widow's application for a pension be granted in accordance with the provisions of Section 5, above quoted, of the Police Pension Fund Act in force and effect at the date of the death of the deceased.

Yours very truly,

JAMES W. BREEN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Real Estate Brokers' Licenses.

June 14, 1922.

HON. AGE ZYLSTRA, City Collector.

Dear Sir:

In response to your request for an opinion as to the right of the city to issue real estate brokerage licenses to corporations, we beg to say:

Sections 2 and 3 of the Act of 1919 relative to corporations for pecuniary benefit read as follows:

“Section 2. Corporations may be organized in the manner provided in this act for any lawful purpose, except for the purpose of banking, insurance, real estate brokerage, the operation of railroads, or the business of loaning money.

“Section 3. Corporations may be organized hereunder for any one of the following purposes:

“‘Building corporations,’ for acquiring, owning, erecting, leasing or operating only one building and the site therefor of not more than eighty thousand square feet of land; ‘agency and loan corporations,’ for the purpose of acting as agents for others in the purchase, sale, renting, and management of real estate and leasehold interests, in the operation of an insurance agency business, in the negotiation of loans on real estate and leasehold interests, of lending money on bonds or notes secured by mortgages or trust deeds on real estate or leaseholds or

on the mortgage bonds of industrial or railroad companies, or of any public service corporation, or on any state, municipal, or quasi-municipal bonds, or for the purpose of buying, selling, pledging, mortgaging or otherwise dealing in any of such securities;

“ ‘Real estate improvement corporations,’ for the purpose of owning land, erecting residences thereon, and selling or leasing such land or residence, which land so owned shall be situated only in the county in which its principal office is located.

“No corporation organized for one of the purposes specified in this section shall have any other object or purpose.”

The Appellate Court in the case of *Haberer & Company v. Smerling*, 225 Ill. App. 336, construed the above section, as follows:

“We cannot construe this section as authorizing a corporation to do a real estate brokerage business. To do so would be to render meaningless and nugatory the express provision in Section 1 of said act, which, like Section 1 of the Act of 1872, expressly excepts ‘real estate brokerage’ from the lawful purposes for which a corporation for pecuniary benefit can be organized under the laws of this state. The ordinary and familiar rules of statutory construction require that effect be given to both of these sections. But it is too plain for controversy that if the quoted provision from Section 3 includes the right to do a real estate brokerage business, then the two sections cannot possibly be harmonized and no effect can be given to the phrase ‘real estate brokerage business’ in Section 1. The two sections, however, may be readily harmonized when we recognize the distinction between an agent empowered to act for another in selling and purchasing real estate, and the nature of a broker’s undertaking, whose authority and duties are more limited. * * *

“A broker in general is defined to be one whose occupation it is to bring the parties together, to bargain, or to bargain for them, in matters of trade, commerce or navigation (citing *Mechem on Agency*, Sec. 2362; *Banta v. City of Chicago*, 172 Ill. 204; *Stratford v. City Council of Montgomery*, 110 Ala. 619). * * *

“In other words, the term real estate brokerage contemplates engaging therein as a business (*O’Neill v. Sin-*

clair, 153 Ill. 525, 531), and our statutes prohibit the organization of a corporation for such business."

We are of the opinion that the decision of the Appellate Court is not only well founded in law, but also fully covers the subject. Therefore, we wish to advise you that the City of Chicago has no authority to issue real estate brokerage licenses to corporations.

Respectfully yours,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Final Payment to C. J. Stein & Co.

June 16, 1922.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

In reply to your request for an opinion relative to whether you have authority to pay over to C. J. Stein & Co. the balance of \$43.10 due on their plumbing contract at the Public Library, completed in 1915, more than six years ago, but which amount you at that time withheld to cover a claim for lien which had been filed against the company, permit us to say:

Section 23 of the Mechanics Lien Act, after providing that persons furnishing labor or materials to a contractor for public improvements may have a lien upon the funds due him from the municipality, provided they shall file proper notice of their claims for liens, says:

"It shall be the duty of any such official so notified to withhold a sufficient amount to pay such claim until the same is admitted by the contractor, or adjusted by the agreement of the parties, or there has been an adjudication of the same in a court of competent jurisdiction."

We understand that the claim here involved has never been "admitted by the contractor," nor has there been an

adjudication of the same in a court of competent jurisdiction. But since the claim is now more than five years old and no suit has been instituted to enforce the same, it is, in our opinion, barred by the Statute of Limitations. The law, therefore, presumes that it has been *paid*—in other words, “adjusted by agreement of the parties.”

We are of the opinion, therefore, that you can safely pay the \$43.10 in question to C. J. Stein & Co.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

License Fees in Proportion to Prices Charged.

June 19, 1922.

MR. JAMES E. TODD, Secretary of the Revenue Commission.

Dear Sir:

In reply to your request for an opinion from the corporation counsel relative to whether the city has the power to base the license fees for ice cream parlors on prices charged, as well as on seating capacity, permit us to say:

The Cities and Villages Act, Art. V, Sec. 1, Paragraph 91, gives the City Council power:

“To tax, license and regulate * * * ice cream parlors” * * *.

It will be noted, therefore, that so far as ice cream parlors are concerned, the right to *tax* is expressly conferred. They differ in that regard from a number of other business establishments, which the city claims merely the right to inspect as a health and safety regulation and to impose a license fee upon merely as remuneration for services rendered or to be rendered in performing such inspection.

Where a license fee is imposed merely as an inspection fee it can not be imposed upon the business itself, but should, theoretically at least, be in proportion to the work and labor

reasonably required to inspect the same (and may therefore be large or small in proportion as the *business establishment* is large or small, but cannot be based upon the *volume* of business). Where, as in the case of ice cream parlors, however, the city has the power to *tax* the business, it may, if it chooses, base the amount of the license fee upon the volume of business, prices charged, or any other practical basis, provided only the license fee thus imposed shall be equitable and reasonably uniform.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Electric Light Pole in Rear of Premises at 5054 West End Avenue.

June 19, 1922.

HON. WM. H. REID, Commissioner of Public Service.

Dear Sir:

In response to your request for an opinion relative to whether the city can compel the Commonwealth-Edison Co. to remove an electric light pole now maintained by them in the rear of the premises of John Cox, 5054 West End avenue, on the ground that it will interfere with his access to a garage that he contemplates building in the rear of his lot, permit us to say:

It is an elementary principle that a land owner, whose property abuts on a public street or alley, is entitled to free and untrammelled access to the same, and a permission granted to a public service company to erect poles in a street or alley is subject to the paramount right of a property owner to have access to his property.

Mantell v. Bucyrus Tel. Co., 20 Ohio C. R. 345.

Hays v. The Columbiana Tel. Co., 21 Ohio C. R. 480.

City of Chicago v. Union Bldg. Assn., 102 Ill. 379.

Ill. Malleable Iron Co. v. Comrs. of Lincoln Park, 263 Ill. 446.

Where the property owner owns the fee of the street, as is the case in subdivisions acquired by common law dedication (which might be the case here, so far as we know), the rights of the property owner are much greater, and he can even forbid entirely the erection of any poles or other obstructions on his portion of the street or alley, unless his consent thereto is first obtained.

Board of Trade Tel. Co. v. Barnett, 107 Ill. 507.

Postal Telegraph Cable Co. v. Eaton, 170 Ill. 513.

Burrall v. American Telephone Co., 224 Ill. 266.

De Kalb County Tel. Co. v. Dutton, 228 Ill. 178.

In all of these cases, however, it was held that the property owner had a right of action directly against the utility company. Whether the city would have any power to compel the company to move its poles for the benefit of a private individual, is a different question. In the ordinance passed by the City Council granting the Commonwealth-Edison Company the right to erect and maintain poles in the streets and alleys of the city, the city did not specifically reserve any general power to compel the company to move its poles at the pleasure of the city officials. And, while it is true that the right thus to erect poles in the streets is not a franchise, but a license, yet after it has been accepted and acted upon it becomes a *contract*, revocable only for cause.

People v. Central Union Tel. Co., 192 Ill. 307.

No doubt, if the city should find that certain poles erected by the company are dangerous, or that they otherwise menace the rights of the *general public*, the city could, under its police power, compel the removal of the same. But where the rights of the public are in nowise affected, but it is merely a question of inconvenience to some individual property owner, that is, in our opinion, a private controversy between him and the company, in which the city has no direct concern.

We are of the opinion, therefore, that unless it can be shown, either that the company has violated some of the terms of the license granted to it by the city, or that the

rights of the general public are in some way involved, the city has no authority to interfere in the controversy.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Right of City to Enforce Adequate Passenger Service on Railroad.

June 27, 1922.

HON. BENJAMIN S. WILSON, Alderman 32nd Ward.

Dear Sir:

Your letter, dated March 28, 1922, relative to the situation regarding the Baltimore & Ohio, Chicago Terminal Railroad Company, together with all papers pertaining thereto, have been received and in compliance with your request for an opinion, I submit the following:

The agreement referred to in your letter is dated February 28, 1890, and is made between George O. Carpenter, Jr., and The Chicago Central Railway Company. The agreement provides in part the following:

“And the said company, or its assigns shall operate at least four suburban trains each way, between the points named from and after the completion of said road, and shall enter one of the depots on the south side in the City of Chicago.”

It should be noted here that the aforesaid agreement was made with an individual and not with the City of Chicago or the Village of Morgan Park, where the land in question is located. For this reason, in so far as the agreement is concerned, the municipality cannot claim any interest thereunder. Furthermore, the ordinance granting the railroad company a right to lay its tracks over the land in question does not contain any provisions as to how many trains should be run and where they should stop. This evidently was left

to the discretion of the railroad company, subject, however, to the control of the Illinois Commerce Commission.

It is not clear whether the particular strip of land upon which the tracks lie was public or private property, but from an examination of the records it appears that this strip was the private property of George O. Carpenter.

It is true that a railroad company may for a valuable consideration agree to locate its road within the authorized limits upon a particular route or through a particular place, provided the contract is made in good faith in the interest of the company, and no public rights or duties are thereby violated. In the case at hand there was, in my opinion, a valid contract made in good faith, but not with the village or city authorities. The grantor in the said agreement may have his remedy if his contract is violated. Where there is a valid contract in regard to the location or maintenance of a station an action may be maintained for damages thereof, or to recover the value of the land conveyed as the consideration for the agreement.

International, etc., R. Co. v. Dawson, 62 Tex. 260.

St. Louis, etc., R. Co. v. Crandell, 75 Ark. 89.

Louisville, etc., R. Co. v. Summer, 106 Ind. 55.

In the case of *Central Mills Company v. N. Y., etc., R. Co.*, 127 Mass. 537, the court held that such contracts are not void as against public policy and may be enforced by or against the railroad company, provided they are entered into by the proper authorities. Where the contractees' right to such a relief is clear mandamus is a proper remedy to compel the railroad company to establish a station, or to restore one which has been abandoned or removed from its former location, as where abandoned without the consent of the railroad commissioners.

People v. Chicago, etc., R. Co., 130 Ill. 175.

Stab v. Republic Valley R. Co., 18 Nebr. 512.

State v. New Haven, etc., E., 37 Conn. 153.

State v. Northern Pacific R. Co., 90 Minn. 277.

But a careful survey of the cases where the relief by mandamus was sought the complaining party was the public.

It also appeared in the great majority of the cases that the railroad in obtaining its permit or franchise agreed to certain conditions. But in the agreement in question the grant by the authorities of the Village of Morgan Park did not contain any such conditions or restrictions.

In the case of *Florida, etc., R. Co. v. State*, the court decided that mandamus will not be granted to enforce a private contract relating to the establishment or maintenance of a station, or to compel a railroad company to establish a station at a particular point within a certain town or city.

31 Fla. 482.

Therefore it is not certain that even George O. Carpenter could specifically enforce his contract, because the general rule is that specific performance of such contracts is discretionary with the court, and performance will not be decreed when it will result in great hardship to the railroad company, without any considerable benefit to the other party.

Conger v. New York, etc., R. Co., 120 N. Y. 29.

A number of cases can be cited supporting the conclusion of this opinion, but they are not necessary in view of the fact that there is nothing in the agreement, under which the city might claim any right, to compel the railroad company to continue the passenger service from Chicago to Blue Island. George O. Carpenter can, if he so desires, bring an action against the railroad company for damages, the general rule being that where a railroad company fails to comply with the covenants or conditions upon which a grant was made to it, the proper remedy against it ordinarily is an action for damages sustained by reason of the breach.

Southern California R. Co. v. Slauson, 138 Cal. 342.

Coger v. Chicago, etc., R. Co., 15 Ill. 366.

Chicago, etc., R. Co. v. Hall, 135 Ind. 91.

Rich v. N. Y. Central, etc., R. Co., 154 N. Y. 733.

Menard v. Delaware, etc., R. Co., 153 Fed. 578.

Therefore, it seems that the city has no legal right, by virtue of the agreement, a copy of which is returned here-

with, to enforce passenger service of four trains daily between Chicago and Blue Island.

Yours very truly,

HARRY F. CHAVERIAT,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Damages of Cab Company on Account of Defects in
Pavement.**

June 28, 1922.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

Replying to your inquiry of April 25, 1922, in regard to the liability of the city for damages sustained by the Yellow Cab Company, on account of the alleged condition of the pavement on Milwaukee avenue near Sangamon street, and on Belmont avenue near Karlov avenue, both on April 16, 1922, we wish to render the following opinion.

First, as regards the liability of the city because of the alleged condition of the pavement on Milwaukee avenue near Sangamon street, the superintendent of the 17th ward reports that on November 29, 1921, permit I. C. 3152 was issued to the Peoples Gas, Light and Coke Company, to open street in front of 643 Milwaukee avenue to repair service pipe. The pavement was restored May 25, 1922. The condition of the pavement on April 16, 1922, was bad, according to his report. However, in response to a further inquiry, the Department of Streets reported that Inspector Kercher stated that the point where the opening was made by the Gas Company was in good condition during the entire period. Since there is a conflict in opinion as to the condition of the pavement at that locality, it stands to reason that the probability is that the pavement was not in an extremely bad condition, if it was in a bad condition at all.

It is an elementary proposition of law that the city is not an *insurer* of the safety, and perfect state of repair, of

its streets. All that can be demanded of the city is that it shall use reasonable care to keep its streets in a reasonable state of repair. The city is not liable for damages caused by defects in its streets, unless the city has had notice of such defects, or unless they have existed for such length of time that the city must be presumed to have notice of same.

In the case of *City of Chicago v. Watson*, 6 Ill. App. 344, Judge McAllister, in delivering the opinion of the court, said:

“The law does not regard the corporate duties of the City of Chicago as placing the corporation in the position of *insurer against accident* to individuals upon its streets and sidewalks, or require any absolute degree of perfection in respect thereto. Hence it follows that it is not liable for every defect therein, though such defect may be the cause of the injury sued for, in the absence of any acts of positive misfeasance on the part of the corporation, its officers, servants or others acting under its authority, within the scope of its powers, *it is responsible only for the exercise of reasonable diligence in keeping its streets and sidewalks in a reasonably safe condition* for travel in the ordinary modes, by night as well as by day, by any persons in the exercise of reasonable or ordinary care to avoid accidents. It is liable to a person so in the exercise of reasonable or ordinary care for any injury received by reason of the bad and unsafe condition of a sidewalk as well when those defects are caused by the wrongful acts of others, as when they are the mere result of the neglect of the corporation itself; but in such cases the basis of the action being negligence, *it is essential to a cause of action that the corporation had notice* of the defective and unsafe condition of the street or sidewalk which caused the injury, or facts to be shown from which such notice may reasonably be inferred; or that proof be given of such circumstances pertaining to such unsafe condition as that the corporation, or its officers having authority to act respecting it, might or ought, by the exercise of reasonable diligence, to have known of it, on the principle that having the means of knowledge and negligently remaining ignorant, is equivalent, in creating a liability, to actual knowledge.”

In *Boender v. City of Harvey*, 251 Ill. 228, our Supreme Court said:

“The city is not bound, under law, to keep its streets *absolutely safe*. It is only bound to use reasonable care to

keep its streets reasonably safe for ordinary travel thereon by persons using due care and caution for their safety. * * *

“Municipal corporations cannot be held liable for every accident that occurs within their limits, but the defect must be such as could have been foreseen and avoided by ordinary care and prudence of the city authorities. * * * Whether a defect in the street is caused by the act of a third person or the failure of the city to repair in general, *the city is not liable unless it had notice of the defect*, or of such facts and circumstances as would by the exercise of reasonable diligence lead a prudent person to such knowledge.”

Other cases to the same effect are:

City of Chicago v. McCarthy, 75 Ill. 602.

City of Chicago v. Murphy, 84 Ill. 224.

Village of Chatsworth v. Ward, 10 Ill. App. 75.

City of Joliet v. Gerber, 21 Ill. App. 612.

City of Paxton v. Frew, 52 Ill. App. 393.

Ransom v. City of Belvidere, 87 Ill. App. 167.

City of Elgin v. Nofs, 96 Ill. App. 291.

Williams v. City of Carterville, 97 Ill. App. 160.

Sherman v. City of Chicago, 101 Ill. App. 313.

O'Donoghue v. City of Chicago, 167 Ill. App. 349.

We are of the opinion, therefore, that, under the facts as they appear to us, the city is in nowise liable on this claim.

It should also be noted that this excavation was made by the Peoples Gas, Light and Coke Company and not by the city. The usual custom is that when an excavation is made by any person other than the city, such person is required to file a bond, indemnifying the city for any accidents which may occur through the negligent performance of the work. In this case, the Bureau of Streets reports that no such bond of indemnification was filed. Therefore, if this were, in fact, such an excavation as to render the person making it liable for any accident incurred from its existence, both the city and the Gas Company would be jointly and severally liable. The Gas Company because it negligently made an excavation which would be liable to injure someone, and the city be-

cause it permitted such an excavation to exist. However, as we stated above, the facts apparently are that this was not such a large excavation or serious defect in the street for which the city or anyone else would be held liable.

In regard to the liability of the city for the alleged condition of the pavement on Belmont avenue, near Karlov avenue, on April 16, 1922, we beg to render the following opinion.

The Bureau of Streets reports that the superintendent of the 27th ward states that upon investigation he finds that two openings, 6 by 4½, were made in the pavement on Belmont avenue, west of Karlov avenue, by the water pipe extension under permit D 99666, issued April 4, 1921, which were repaired by city forces June 25, 1921, but have since settled quite recently to three inches below the surrounding pavements, owing to excessive rains, also that the pavement east of Karlov avenue, on the north side of Belmont avenue, has settled recently. He further reports that he has no knowledge of any depressions in the pavement on April 16, 1921, at the precise location mentioned.

Assuming these facts to be true, then, we are of the opinion that the city is in no wise liable, because if there were such a slight depression in the pavement, it was obviously not such a serious defect that the city should be liable for a lack of reasonable diligence in repairing the same.

Yours very truly,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Corrected Mittimus.

July 6, 1922.

HON. JOSEPH SIMAN, Superintendent, House of Correction.

Dear Sir:

In reply to your request for an opinion as to whether a corrected mittimus could take the place of an original mitti-

mus, we beg to state that our Supreme Court has repeatedly held that a mittimus cannot be altered after the defendant has commenced to serve the punishment imposed by the court.

In other words, that, after the court in a criminal case has imposed a sentence of imprisonment, and the defendant has commenced to serve the sentence, the trial court has no further jurisdiction in the case and cannot change the sentence nor make any amendment as to substance, and any attempt on the part of the court to do so is absolutely without jurisdiction and void and should be disregarded by the warden of the penitentiary or the superintendent of the House of Correction as the case may be.

A case directly in point is that of *People, ex rel. Huber v. John L. Whitman*, 277 Illinois 408. In that case Huber had been sentenced by the court on October 3, 1916, to serve a term in the House of Correction, and had commenced to serve his sentence, when, on October 11, within thirty days after his sentence, the court, upon motion of his attorney, vacated the judgment and granted him a new trial and thereupon issued an order directing Mr. Whitman, as superintendent of the House of Correction, to discharge the prisoner since the judgment had been vacated. Mr. Whitman refused to recognize the court's authority to thus change the sentence and disregarded the court's order in that behalf.

Thereupon Huber applied to the Supreme Court for a writ of *habeas corpus*. The Supreme Court, however, held that the Municipal Court had lost all jurisdiction over the case, after the defendant had once commenced to serve his sentence, and that any orders on the part of that court modifying or vacating the sentence were wholly void and that the superintendent of the House of Correction did exactly right in ignoring the same.

The Supreme Court said, in that case:

"In criminal cases the general rule that a court may vacate its judgment during the term applies only while the judgment remains unexecuted, but it has no power to so vacate after the defendant has been sentenced and committed to the custody of the proper officer of the penitentiary or reformatory, as the defendant has

then entered upon the execution of his sentence and the court has lost jurisdiction of his person."

Another case to the same effect is that of *People v. Turney*, 273 Ill. 546. In that case one Letukas had been sentenced to the penitentiary and had already commenced to serve his sentence. Thereupon, before the end of the term at which he was sentenced, the court, upon motion of his attorney, vacated the sentence and granted him a new trial. Thereupon the attorney general filed a petition in the Supreme Court for a writ of mandamus commanding the judge of the Criminal Court to expunge from the record the said order vacating the sentence and granting a new trial, and the Supreme Court granted such a writ on the ground that the trial judge had lost jurisdiction of the person of the defendant as soon as he had commenced to serve his sentence, and the court had therefore no authority to modify the judgment or grant a new trial.

The Supreme Court after citing a large number of cases in support of its opinion, said:

"It is unnecessary to quote further from the authorities. While it is true that these cases all turn upon the proposition that in thus increasing the sentence imposed upon the defendant he is made to suffer punishment under two distinct sentences for the same offense and has been twice placed in jeopardy upon the same charge, we perceive no difference, in principle, between the questions there presented and the one before us. Under the holding in those cases it must follow that when the Criminal Court passed sentence upon Letukas and issued its warrant or mittimus to the superintendent of the reformatory and Letukas was delivered into his custody the power of the court over him was at an end by its own order. * * *

"The superintendent of the reformatory, by virtue of the order committing Letukas to that institution, was bound to keep him there safely, and he had no power to release him or to produce him elsewhere except in some of the modes provided by law. The only method provided whereby the superintendent of that institution could release Letukas or deliver him to any other officer was upon a proper order of reprieve, commutation or pardon by the executive, or a reversal, or a reversal and

remandment of the judgment of conviction, or upon the service upon him of a writ of *habeas corpus ad testificandum* commanding him to produce Letukas in the court designated, for the purpose of testifying.”

In the case of *People v. Leincke*, 290 Ill. 560, the court said:

“As a general rule a court retains jurisdiction over a judgment during the term at which it is rendered and may for proper cause vacate the judgment during the term, but in a criminal cause it can only vacate or change the judgment while it remains unexecuted and is without jurisdiction to vacate or change the judgment after the prisoner has begun serving his sentence.”

In 16 Corpus Juris, page 1314, it is stated:

“As a general rule, where defendant has executed or entered upon the execution of a valid sentence, the court cannot even during the term at which the sentence was rendered, set it aside and render a new sentence. Nor can any amendment to the judgment be allowed where it would require a new sentence to be pronounced.”

To the same effect are *People v. Whitson*, 74 Ill., page 20; *State v. Meyer*, 40 L. R. A., new series, page 90.

The above rule applies to cases where the sentence calls for imprisonment in any event. If, however, the sentence calls merely for a *fine*, with imprisonment until the fine is paid, the prisoner can terminate his imprisonment at any time by paying his fine, and, in *state* cases, by giving security for the payment thereof. (Illinois Crim. Code, Div. XIV, Sec. 16.)

We are of the opinion, therefore, that after a prisoner has been sentenced to the House of Correction and has begun to serve his term under a mittimus duly issued, the trial court is wholly without jurisdiction to modify, alter or amend such judgment or sentence in any matter of substance, and that any attempt on the part of any court to do so is absolutely void and that it is your duty as such superintendent to disregard the same.

Very truly yours,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Apartment Building Height.

July 7, 1922.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

In response to your request for an opinion as to your authority to issue a permit for an apartment building to be erected on Lake View avenue, opposite Lincoln Park, we submit the following:

The proposed building is to be located at the southwest corner of Lake View avenue and Arlington place. It will front on Lake View avenue, overlooking the park. The owners contemplate a structure about 135 feet high. The city maps show that Arlington place is 46 feet wide, and that Lake View avenue, the street on which the lot fronts is 50 feet wide and runs alongside the park.

The question to be decided is whether the issuance of such a permit would be contrary to the provisions of Section 425 of The Chicago Code of 1911 governing the height of buildings of this character. The part of said section which is involved in this matter reads as follows:

“The height of a new tenement house shall not exceed by more than one-half the platted width of the widest street on which it abuts, and no existing tenement house shall be increased beyond such height. Provided, however, that any distance the building sets back from the lot line shall be added to the width of the street in making this computation.”

Parties interested in the proposed building have presented a letter from the chief engineer of the commissioners of Lincoln Park in which he says that Lake View avenue at this point is regarded by the commissioners as a street one hundred feet wide and that the jurisdiction of the city goes to the center line, so that the west fifty feet are under city jurisdiction and the east fifty feet are under park jurisdiction.

If the letter above mentioned were an official document sent forth by the commissioners it would settle the matter, because the territory east of the fifty feet platted on the city

maps belong to the park commissioners, and they have complete control over its use. If they decided that fifty feet alongside of the part platted by the city should be a part of the street they would have the right to make it such, whereupon the street would actually be one hundred feet wide. Likewise, if they declared (as their chief engineer does in his letter) that they regarded these fifty feet as part of the street, even if not opened as a roadway, they would be estopped from objecting to our treating the street as one hundred feet wide.

Hence, the difficulty is in the nature of the communication presented. It is merely an expression of opinion on the part of an employe of the commission and this opinion assumes something to be a fact which is not a fact. The opinion says the street is considered one hundred feet wide when in fact it is only fifty feet wide, and there is a part of the park between the street and the roadway near it. On a plat presented by the parties in interest the park roadway alongside of Lake View avenue runs at varying distances from the street. At some places it seems to be only about 25 or 30 feet away, while at other places, and especially opposite the premises in question, it is at least 75 feet away.

The provisions of Section 425 quoted above are designed as requirements making for better light and air. The fact that the height requirement varies and that a building may be erected to a greater height when set back from the lot line gives color to the argument advanced to the effect that the restriction does not apply when the building faces an open public place. We are not, however, disposed to so hold, since the City Council must have known that there are many such places, and no allowance is made for such conditions. The set-back on the opposite side of the street cannot ordinarily be taken advantage of.

We would feel bound to adhere to the exact language of the ordinance, if it were not for the fact that the roadway which runs irregularly alongside the outer edge of the part at this point, as above set forth, is in effect part of the street. This roadway is really the main thoroughfare, and practically all the traffic going north and south at the western side

of the park goes over it. Compared to the traffic on this roadway the traffic on Lake View avenue is almost negligible.

We therefore might be justified in considering this roadway as the principal street in front of the premises in question or rather that there is a double roadway with a strip of the park between the two. While this strip varies in width, it is at no place wide enough to admit of the erection of any substantial improvement going to any great height. Opposite the site of the proposed apartment building this strip is a little wider than to the north of same, but it is hardly wide enough to assume that it breaks the general trend or direction of the roadway. Since it is practically impossible to accommodate the traffic through the park without a roadway on the west side thereof, we believe the roadway now existing can be regarded as a permanent fixed highway, and for purposes of determining height limitations it can be treated as a part of the street.

Hence, in view of the peculiar situation at this point, we recommend that the permit should issue.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

Acting Corporation Counsel.

Permit for Trade School.

July 17, 1922.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

We are in receipt of your communication of July 15, 1922, forwarding to us an application of the Coyne Trade & Engineering Schools for a permit to occupy the main and second floors of the building located at 500 South Throop street, in the City of Chicago.

From your communication we conclude that what you desire us to advise you is whether or not the Coyne Trade &

Engineering Schools comes within the definition of the word "school" as used in Section IVb or Section VIII of the Building Code of the City of Chicago.

From an investigation we learn that the Coyne Trade & Engineering Schools is not a classical institution but is devoted entirely to instructing its students in manual training and working on machines and in the use of tools. The persons attending this school are more in the nature of apprentices than students, and in nearly every instance are pupils who have graduated from some classical institution of learning.

The word "school" has been construed to mean a place of primary instruction; a common school or a grammar school. *Northrup v. City of Richmond*, 53 Southeastern.

In the case of *State v. Kallagher*, 145 Wis. 243, the word "school" was construed to mean an institution of learning below a college or university, or a place of primary instruction, and the court in that case held that the word generally referred to a common or public school maintained at the expense of the public.

In the case of *Murphy v. Worcester Consolidated Street Railway Company*, 199 Mass., page 275, the Supreme Court of Mass. expressly held that the word schools would not be construed to include higher institutions of learning such as colleges, universities or institutions for the teaching of trades, professions or business.

It is therefore my opinion that the Coyne Trade & Engineering Schools is not a school within the meaning of either Section IVb or Section VIII of the Building Code of the City of Chicago, and in exercising your discretion as to the issuance of the permit in question you should not require it to comply with any of the provisions of either of said sections.

In conclusion, I desire to respectfully suggest that, in my opinion, the applicant is entitled to have the permit issued as requested.

Yours truly,

J. W. BREEN,
Acting Corporation Counsel.

Illinois Pawners Society Bond.

July 18, 1922.

HON. AGE ZYLSTRA, City Collector.

Dear Sir:

We have your letter of July 11th, above subject, in which you inform us that the Illinois Pawners Society claim to be organized as a limited partnership having three general and about eighty limited partners. You ask us to advise you as to the proper form of the bond to be given by them when obtaining their pawn brokers license. Section 45 of Chapter 106A of Cahill's Illinois Statutes reads as follows:

"A limited partnership is a partnership formed by two or more partners under the provisions of Section 2, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership."

We advise you that in signing the bond each of the three general partners should sign his name, and after the signatures should appear the following: "Doing business as Illinois Pawners Society, a limited partnership."

Yours respectfully,

FRANK W. DERBY,

Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,

*Acting Corporation Counsel.***Liability for Damage to Automobile.**

July 25, 1922.

MR. ALBERT KUPPENHEIMER, 415 South Franklin street.

Dear Sir:

In reply to your communication to the corporation counsel relative to damages alleged to have been done to your machine by a Fire Department repair truck on or about June 13, 1922, we beg to state, that independent of any question of

whose negligence may have caused the injury, our Supreme Court has repeatedly held that a city is not liable for negligent acts of the members of its Fire Department. The reason for this is well expressed in the case of *Wilcox v. City of Chicago*, 107 Illinois 334, where the court said:

“On turning to the reported cases of the courts of other states, we find a uniform line of decisions holding that cities are not liable for the negligent acts of the officers or men employed in their fire departments whilst in the discharge of their duty, thus creating an exception in this class of cases to the general rule of *respondeat superior*. In his work on Municipal Corporations, Dillon (1st ed., Sec. 774), says: ‘So, although a municipal corporation has power to extinguish fires, to establish a fire department, to appoint and remove its officers, and to make regulations in respect to their government and the management of fires, it is not *liable for the negligence of the firemen* appointed and paid by it, who, when engaged in the line of their duty, upon an alarm of fire ran over the plaintiff, in drawing a hose reel belonging to the city, on their way to the fire; nor for injuries to the plaintiff caused by the bursting of the hose of one of the engines of the corporation, through the negligence of a member of the fire department. The exemption from liability is placed upon the ground that the service is performed by the corporation in obedience to an act of the Legislature,—is one in which the corporation has no particular interest, and from which it derives no special benefit in its corporate capacity; that the members of the fire department, although appointed by the city corporation, are not the agents and servants of the city, for whose conduct it is liable, but they act rather as officers of the city, charged with a public service, for whose negligence in the discharge of official duty no action lies against the city without being expressly given, and the maxim *respondeat superior* has, therefore, no application.’ He refers to the cases of *Hafford v. New Bedford*, 16 Gray 297, and *Fisher v. Boston*, 104 Mass. 87, which support the text. In New York the same doctrine is applied in *Maximilian v. Mayor*, 62 N. Y. 160, and *Smith v. Rochester*, 76 *id.* 513. In Connecticut, in the case of *Jewett v. New Haven*, 38 Conn. 368. In Iowa, in *Ogg v. Lansing*, 35 Iowa 495, and *Field v. Des Moines*, 39 *id.* 575. In Missouri, by *Heller v. Mayor*, 53 Mo. 159. In California, in *Howard v. San Francisco*, 51 Cal. 52. The

same doctrine has been announced by the Supreme Court of Ohio.

In favor of the doctrine, it may be that an additional, if not more satisfactory, reason for its adoption and rendering it an exception to the general rule may be found in public policy. If liable for neglect in this case, the city must be held liable for every neglect of that department, and every employe connected with it, when acting within the line of duty. It would subject the city to the opinions of witnesses and jurors whether sufficient dispatch was used in reaching the fire after the alarm was given; whether the employes had used the requisite skill for its extinguishment; whether a sufficient force had been provided to secure safety; whether the city had provided proper engines and other appliances to answer the demands of the hazards of fire in the city; and many other things might be named that would form the subject of legal controversy. To permit recoveries to be had for all such and other acts would virtually render the city an insurer of every person's property within the limits of its jurisdiction. It would assuredly become too burthensome to be borne by the people of any large city, where loss by fire is annually counted by the hundreds of thousands, if not by the millions. When the excitement is over and calm reason assumes its sway, it may appear to many where other methods could have been adopted to stay destruction, that appear plausible as theories, and their utter fallacy can not be demonstrated by any actual test. To allow recoveries for the negligence of the fire department would almost certainly subject property holders to as great, if not greater, burthens than are suffered from the damages from fire. Sound public policy would forbid it, if it was not prohibited by authority."

For the reasons above stated we are of the opinion that the city is in no wise liable on this claim.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,
Acting Corporation Counsel.

**Right of City to Own and Operate Motor Busses and to
Authorize Private Owners to Operate Same.**

Chicago, August 2, 1922.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

In response to your request for an opinion as to what the city's rights are with respect to the ownership and operation of passenger motor busses for the transportation of the public, we submit the following:

The city has the undoubted right to own and operate motor busses for the transportation of passengers. This right is granted under an act of the General Assembly passed June 26, 1913, entitled as follows:

“An Act to authorize cities, villages and incorporated towns to acquire, construct, own and to lease or operate public utilities and to provide the means therefor.”

Sections 1 and 2 of said act, which grant this right in express terms, read as follows:

“Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That any city in this state shall have the power, subject to the provisions of this act, to acquire, construct, own and operate any public utility the product or service of which, or a major portion thereof, is or is to be supplied to the city or its inhabitants, and to contract for, purchase, and sell to private persons or corporations the products or service of such utilities; to lease any public utility owned by the city to any corporation organized under the laws of this state for the purpose of operating such public utility, for a period not longer than twenty years; to fix the rates and charges for the services rendered by such public utilities; and to make all needful rules and regulations in relation thereto.”

“Section 2. The term ‘public utility,’ when used in this act, means and includes any plant, equipment or property, and any franchise, license or permit, used or to be used for or in connection with the transportation of persons or property or the conveyance of telegraph or telephone messages; or for the production, storage, transmission, sale, delivery, or furnishing of cold, heat, light,

power, water, or for the conveyance of oil or gas by pipe line; or for the storage or warehousing of goods; or for the conduct of the business of wharfinger.”

It will be observed from the language of the statute that the city may itself own and operate such bus lines, or it may lease utilities owned by it to an operating company. In both events it must acquire or construct the utility, and to do this there must be an ordinance passed for that purpose and submitted to the voters.

The right to authorize others to furnish motor bus service is derived from Clause 42 of Section 1, Article V, of the Cities and Villages Act, where such power is conferred in the following language:

“Forty-second. To license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen and all others pursuing like occupations and to prescribe their compensation.”

In any grant under the above clause the city may incorporate provisions for the taking over of the utility, or it may provide that instead of exercising such reserved right itself, it can transfer the right to another person or corporation. Neither the ordinance making the grant in the first instance nor any ordinance transferring the rights to another person or corporation required a referendum, but in case the city takes over the utility for purposes of municipal ownership or operation, the ordinance providing therefor must be submitted to a referendum.

The section of the act first above mentioned which provides for the reservation of the right to purchase or transfer is as follows:

“Reservation of rights in lease or grant.) §6. It shall be lawful for any city to incorporate in any franchise, license or permit to a public utility company reservation of the right on the part of the city to take over all or any part of the property, plant or equipment used in the operation of such public utility, at or before the expiration of such grant, upon such terms and conditions as may be provided in the grant, and it shall also be lawful to provide in any such grant that in case such reserved right be not exercised by the city, and it shall

grant the right to another person or corporation to operate such utility in the streets and parts of streets occupied by its grantee under the former grant, the new grantee shall purchase and take over the property located in such streets, and parts of streets, upon the terms which the city might have taken it over."

Public utilities acquired by the city and operated by it under the Municipal Ownership Act quoted from are not subject to regulation or control by the Illinois Commerce Commission.

Springfield Gas & El. Co. v. City of Springfield, 292 Ill. 236.

Same v. Same, 42 U. S. Supreme Court Rep. 24.

Such utilities, however, if owned or operated by private parties, come within the provisions of the Commerce Commission Act, and the commission has power to regulate and control.

Hence, it is plain that the city's power in respect to such method of transportation is complete. It is only necessary to determine what means it has to carry these powers into effect.

In order to finance a proposition of this kind the City Council may appropriate from its general corporate fund, or it may issue certificates payable from the income from such utility. We also show farther on that the Traction Fund may be used for this purpose.

With respect to the granting of rights to private persons and corporations for the purpose of operating such busses, these may be conferred by ordinances with reservations in same as indicated above, so that the city can take the utilities over when it sees fit, or transfer the rights to other parties.

It is not at present necessary, however, to pass ordinances granting such rights or making any provision for the future, but private persons and corporations that obtain certificates of public convenience and necessity may be given temporary permits to operate until December 1, 1922. In the meanwhile ordinances granting rights of a more permanent nature can be passed.

The ordinance under which such temporary permits may be issued was passed on June 29, 1922. (Council Journal, page 754.) It makes it unlawful for any person, firm or corporation to operate motor busses as common carriers on the streets of the city without first having obtained a specific grant of authority from the City Council, but it contains the following proviso:

“provided that in all cases where the person, firm or corporation operating such busses shall have obtained a certificate of public convenience and necessity for such purpose, the superintendent of police shall issue a temporary permit valid until December 1, 1922, and such busses may be temporarily operated pending further action on the part of the City Council;”

The temporary operation of motor busses may therefore be taken care of by parties securing certificates of public convenience and necessity from the Illinois Commerce Commission, whereupon permits good until December 1, 1922, can be issued to them.

Reverting now to the question of the right of the city to use the Traction Fund for the purpose in question, we beg to advise you that this is not the first time that this matter has received attention from the corporation counsel. In an opinion rendered by Corporation Counsel John W. Beckwith under date of February 3, 1915, and published on page 306 of the opinions of the corporation counsel from October 6, 1914, to April 26, 1915, the subject is gone into very fully and the conclusion is arrived at that the Traction Fund may be used for such purposes upon proper action being taken by the City Council.

We have examined this opinion with great care, and we concur in the reasoning and in the conclusions arrived at. We therefore do not find it necessary to discuss the matter at length, but append a copy of the opinion hereto.

The clause in each of the Traction Ordinances under which the fund has been accumulated is as follows:

“It is further provided that, subject to the action of the City Council of said city, the said city shall deposit the amount so paid to the said city to the credit of a separate fund to be kept and used for the purchase

and construction of street railways by said city; but any failure to comply with this provision shall in no way affect the rights or obligations of the company under this ordinance.”

Clearly the city has not tied up the Traction Fund in such a way that it can not use such fund unless it actually purchases or constructs street railways. As is pointed out in the opinion above referred to, it may be that this will never be desirable. In such event the fund would be entirely useless.

We are of the opinion, therefore, that the city may own and operate motor busses for the transportation of passengers and that it may use the Traction Fund for this purpose upon proper action being taken by the City Council. We are also of the opinion that the city may license private persons or corporations to operate such busses if that is desirable; that in the grants to such private persons or corporations reservations may be made which will enable the city to take over the utilities later or transfer the rights to others; and that at the present time temporary permits may be granted to persons and corporations holding the proper certificates from the Illinois Commerce Commission, to operate such busses until December 1, 1922.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Location for Livery Stable and Garage.

August 7, 1922.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

In response to your oral request as to whether or not you should issue a building permit to George Frederick Lovdall for a livery stable and garage at 1413 to 1417 Sedgwick

street, we desire to advise you that upon investigation it appears that there is and has been for over thirty years a livery stable located on these premises, and that all the applicant is attempting to do is to reconstruct the present livery stable so as to make it a modern up-to-date one in order to comply with all the sanitary regulations provided by the ordinances of the City of Chicago.

Under Section 616 of The Chicago Code of 1911 it is provided that it shall hereafter be unlawful to construct any building or structure, for stabling or keeping ten or more horses, within a distance of 400 feet from any church, school, hospital, public park or public playground.

This department has ruled that the above provision of the ordinance applies to livery stables erected after its passage, and that it can not be construed to apply to livery stables erected prior to the passage of the ordinance. The livery stable in question is within 400 feet of a church. But, as the permit will only result in the remodeling of an existing livery stable and not in the erection of a new one, it is our opinion that the applicant is entitled to a building permit for a livery stable.

In regard to the building permit for the garage, we believe that you will readily agree with us that under the present ordinances of the city regulating the erection and location of garages, the applicant is entitled to a building permit for a garage upon his filing with the commissioner of buildings a plat of the proposed garage in accordance with the existing ordinances of the city.

Yours very truly,

JAMES W. BREEN,
First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Election of Municipal Court Judges.

August 9, 1922.

HONORABLE HARRY OLSON, Chief Justice of The Municipal
Court of Chicago:

Dear Sir:

We are in receipt of your communication of July 15, 1922, advising us that at the last election there were added to The Municipal Court of Chicago four judges: Thomas J. Peden, Peter H. Schwaba, Alberto N. Gualano and Emanuel Eller, and that the question has arisen as to when their terms of office began, whether from the time of election or from the time they received their commissions, and requesting us to give you an opinion on the subject in order that you may be able to properly O-K payrolls for them.

Section 272 of Chapter 37 of the Municipal Court Act, in force July 1, 1905, Hurd's Revised Statutes 1919, page 929, provided that the chief justice and the associate judges of the Municipal Court provided for in the original act creating The Municipal Court of Chicago, shall be elected on the first Tuesday after the first Monday in November, A. D. 1906, and that the chief justice shall hold his office for the term of six years and until his successor shall be elected and qualified, and that of the said associate judges so to be elected nine shall be elected for the term of two years, nine for the term of four years and nine for the term of six years and until their respective successors have been elected and qualified, and on the first Tuesday after the first Monday of November, A. D. 1908, and on the first Tuesday after the first Monday of November, A. D. 1910, and on the first Tuesday after the first Monday of November every sixth year thereafter there shall be elected nine associate judges of said Municipal Court, and on the first Tuesday after the first Monday of November, A. D. 1912, and every six years thereafter there shall be elected a chief justice and nine associate judges of the said Municipal Court as successors in office of the chief justice and associate judges of the Municipal Court by this act required to be elected, each of whom shall hold

his office for the term of six years and until his successor shall be elected and qualified. The judges so required to be elected shall enter upon the discharge of their duties on the first Monday of December following their election.

The act also provides that vacancies in the office of chief justice or associate judge of the Municipal Court shall be filled by election at the regular municipal, judicial or other general election which shall occur next after a period of sixty days from the time such vacancies respectively occur, but where the unexpired term does not exceed one year, the vacancy shall be filled by appointment by the governor.

From an investigation it appears that the four judges above named were elected judges of The Municipal Court of Chicago at the election held June 5, 1922, to fill vacancies resulting from the death or resignation of former incumbents.

The Municipal Court Act expressly provides that the chief justice and associate judges of the Municipal Court shall enter upon the discharge of their duties upon the first Monday of December following their election. This provision of the statute, however, does not apply to associate judges elected to fill vacancies, and the statute is silent as to the time when associate judges elected to fill vacancies in The Municipal Court of Chicago shall assume their duties. Our Supreme Court has ruled that, where no specific time is fixed for the commencement of the term of an elected official, the term is held to commence from the day of election. *People v. Sweitzer*, 280 Ill. 445.

Section 274, Chapter 37, of the Municipal Court Act, Hurd's Revised Statutes 1919, page 929, provides that every chief justice and associate judge of the Municipal Court of Chicago, before entering upon the duties of his office, shall take and subscribe the following oath or affirmation:

"I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States and the Constitution of the State of Illinois, and that I will faithfully discharge the duties of the office of chief justice or associate judge of the Municipal Court of Chicago according to the best of my ability."

It is also prescribed that said oath shall be filed in the office of the secretary of state.

In discussing the question of when the term of office of an elective official begins and from what date he is entitled to draw salary, the Supreme Court of Illinois, in the case of *People v. Sweitzer*, 280 Ill. page 454, said:

“There is a distinction between the cases which define the beginning and duration of a term of office as fixed by law or relating to the office itself, and cases which define the term of the incumbent of an office or the time such incumbent is in office. As applied to the holder of the office, his term, by which is meant his time of holding the office, of course, can never be said to begin until he has qualified by filing his oath where an oath is required, or his oath and bond where both are required, and he would not be entitled to draw his salary or perform the duties of the office until he qualified. But that has nothing to do with the term of office as it is fixed by law.”

In the case of *Smith v. The Mayor of New York*, 37 N. Y. Rep., page 520, the Court of Appeals said:

“An office in this country is not property, nor are the prospective fees of an office the property of the incumbent. The incumbent can not sell his office, or purchase it, or incumber it. It will not pass by an assignment of all his property, nor will such assignment affect his right to prospective fees. The Legislature may diminish or abolish the fees at pleasure, or may render it a salaried office. The corporation of the City of New York may do the same when it fixes the rate of compensation. It is only in the cases of a few of the state offices that the constitution prohibits such interference. The same authority holds, and it is conceded by the appellants here, that the right to fees or compensation does not grow out of any contract between the government and the officer, but arises from the rendition of the services.”

In the case of *Jump v. Spence*, 28 Md., page 10, the court said:

“In our theory of government the office is not supposed to be created for the benefit of the individual who may be elected to fill it, but for the good of the people, to be derived from the actual and faithful exercise of its functions; and hence it has been well said that, by a com-

mon sense interpretation of the Constitution, we could not do otherwise than conclude it to be the purpose of its framers 'to make no gratuities, but to pay for services actually rendered, and that no one under it is authorized to claim a salary attached to an office, until he has accepted it, and qualified himself by taking the prescribed oath.' * * *

"The issuing of the commission, and the taking of the prescribed oath by the party, are conditions precedent to the complete investiture of the office, and no person can lawfully assume the responsibilities, or exercise the functions of judge, until they are complied with; and these conditions not having been complied with in this case before the time for which the salary is claimed, we think it clear that the appellee can make no rightful claim to such salary."

It is our opinion that the terms of the four judges referred to in your communication commenced to run from the day of their election and that they had a lawful right to assume the duties of associate judges of The Municipal Court of Chicago on any day thereafter that they might lawfully be able to comply with the conditions imposed by statute upon persons elected judges of The Municipal Court of Chicago as prerequisites to their assuming the duties of the office.

Upon the question as to when their salaries should commence, it is our opinion that, under the law, an associate judge of the Municipal Court of Chicago is not entitled to draw salary as such associate judge from the City of Chicago until he shall have first complied with all of the provisions of the statute and shall have actually entered upon the discharge of his duties.

Yours truly,

JAMES W. BREEN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel,

**Electric Light Wires in Rear of Premises at 5145-47 North
Clark Street.**

August 12, 1922.

MESSRS. NELSON & WESTERBERG, 5145-47 North Clark St.

Gentlemen:

We have your letter of August 8, 1922, in which you state that you are arranging to build an addition to your building, and that there will be a fire escape on the rear of the said building, and that said fire escape will extend into the alley. You further state that the Commonwealth Edison Company have wires in the alley which will interfere with the proposed fire escape, and that they have refused to remove the said wires in order to allow you to construct the fire escape. You request us to advise you as to your rights in the matter, and in compliance with said request, we advise you as follows:

It is an elementary principle that a land owner, whose property abuts on a public street or alley, is entitled to free and untrammelled access to the same, and a permission granted to a public service company to erect poles and wires in a street or alley is subject to the paramount right of a property owner to have access to his property.

Mantell v. Bucyrus Tel. Co., 20 Ohio C. R. 345.

Hays v. The Columbian Tel. Co., 21 Ohio C. R. 480.

Where the property owner owns the fee of the street, as in the case in subdivisions acquired by common law dedication (which might be the case here, so far as we know), the rights of the property owner are much greater, and he can even forbid entirely the erection of any poles or other obstructions on his portion of the street or alley, unless his consent thereto is first obtained.

Board of Trade Tel. Co. v. Barnett, 107 Ill. 507.

Postal Telegraph Cable Co. v. Eaton, 170 Ill. 513.

Burrall v. American Telephone Co., 224 Ill. 266.

De Kalb County Tel. Co. v. Dutton, 228 Ill. 178.

In all of these cases, however, it was held that the property owner had a right of action directly against the utility

company. Whether the city would have any power to compel the company to move its poles and wires for the benefit of a private individual, is a different question. In the ordinance passed by the City Council granting the Commonwealth Edison Company the right to erect and maintain poles and wires in the streets and alleys of the city, the city did not specifically reserve any general power to compel the company to move its poles and wires at the pleasure of the city officials. And, while it is true that the right thus to erect poles and wires in the streets is not a franchise, but a license, yet after it has been accepted and acted upon it becomes a *contract*, revocable only for cause.

People v. Central Union Tel. Co., 192 Ill. 307.

No doubt, if the city should find that certain poles and wires erected by the company are dangerous, or that they otherwise menace the rights of the *general public*, the city could, under its police power, compel the removal of the same. But where the rights of the public are in nowise affected, but it is merely a question of inconvenience to some individual property owner, that is, in our opinion, a private controversy between him and the company, in which the city has no direct concern.

We are of the opinion, therefore, that unless it can be shown, either that the company has violated some of the terms of the license granted to it by the city, or that the rights of the general public are in some way involved, the city has no authority to interfere in the controversy.

Yours very truly,

FRANK W. DERBY,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Right of Way of Motor Vehicles.

August 12, 1922.

JOHN C. MCCOY, Captain C. W. S.—U. S. A.

Dear Sir:

In answer to your letter of August 7, 1922, requesting an opinion involving the right of way of motor vehicles in which you ask which car has the right of way where a touring car traveling west on Roosevelt Road and a limousine traveling south on Francisco avenue approach the intersection of these two streets at the same time, wish to advise that the limousine on Francisco avenue has the right of way, it being to the right of the other car. There is no law or ordinance which designates Roosevelt Road at the intersection of South Francisco avenue as a preferential traffic street. In reference to the particular question you have in mind, would reply that Section 83 of the motor vehicle law that you have quoted would govern.

Prior to the case of *Partridge v. Eberstein*, No. 27176, recently decided in the Appellate Court, the interpretation was taken that the rights of automobile drivers in such an instance as you have described would be co-relative because of the fact that both streets were traffic streets. But the court in this case decided that under the statute it is the duty of the driver on the left to give the right of way to the driver on the right, even though both were traveling on traffic streets. Whichever car is approaching from the right, under the statute therefore, would have the right of way and it would be the duty of the driver of the other car approaching the intersection to stop it or sufficiently check its speed so as to allow the other car to pass in front of it.

Would advise your reading *Lenartz v. Funke*, No. 26929, recently decided in the Appellate Court: *Brillinger v. Ozias*, 186 App. Division, Supreme Court, New York, page 221, wherein an interpretation of the words "grant the right of way" are given. See also *Mathes v. Aggeler*, 179 California, page 697. As a general rule violation of a statute is negligence *per se*. *Luken v. L. S. & M. S. Ry. Co.*, 248 Ill. 377.

In view of these decisions it would appear that under the construction of preference being given to drivers on the right that whoever should be in that position on a traffic street would, of course, be "technically" deemed to have a preference.

The court when asked to define when a vehicle was approaching from the right, in the case of *Partridge v. Eberstein*, within the meaning of the statute, although not defining, suggested "that a vehicle is approaching an intersection from the right within the meaning of the statute and entitled to the right of way when, on its left, on an intersecting street another vehicle is approaching whose driver in the exercise of due care, would or should see that unless he yielded the right of way the vehicles might or would collide."

In response to your request for a copy of the local rules governing motor vehicle traffic, beg to submit the enclosed booklet.

Very truly yours,
WILLIAM C. HENRY,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Power of the State to Regulate the Prices and Distribution of Coal.

August 15, 1922.

HON. SAMUEL A. ETTELSON, Corporation Counsel.

Dear Sir:

Complying with your verbal request for an opinion regarding the power of the state to regulate the prices and distribution of coal, I beg leave to submit the following:

That the state, in times of public danger and emergency, may exercise the power of eminent domain to the extent of seizing and operating the coal mines in this state. That power to be exercised by the General Assembly or some appropriate delegated state agency.

Laws should be enacted declaring the intention of the

state to subject this property to the public use, designating the agencies by which the power is to be exercised, and providing a definite method for compensation to the owner, to satisfy the requirements of the rule stated above.

The General Assembly, under the police power, may enact laws which provide for the regulation of this industry in time of public danger and emergency, and which provide for seizing and operating the mines, in case that is necessary to accomplish the purpose of the regulation.

See Attorney General's printed report, Illinois 1917-1918. Opinion No. 5017, pages 606-617.

Also Laws of Illinois, 1919, Senate Bill No. 749, page 712. An act in relation to the acquisition of raw materials and manufactured products entering into public improvements of the state and defining the powers of the Department of Public Works and Buildings with reference thereto.

Also Laws of Illinois, 1919, House Bill No. 418; pages 39, 40, 41. An act to establish a mining investigation commission of the State of Illinois, and to make appropriation therefor.

In this connection, and to illustrate our meaning, it will suffice to state the general proposition in the language found on page 473 of Volume 9 of the Encyclopedia of United States Supreme Court Reports, where it is said:

"The general police power is reserved to the states. The power to protect the public health and the public safety, to preserve good order and the public morals, to protect the lives and property of their citizens, 'the power to govern men and things' within the limits of their dominions, by any legislation appropriate to that end and which does not encroach upon the rights guaranteed by the national Constitution, nor come in conflict with the acts of Congress passed in pursuance of that instrument, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States."

256 Federal Reporter, pages 708-709.

The following data and authorities are submitted on the question of Federal regulation under the Secretary of Commerce Hoover's plan for distributing coal. See Federal Trade

Information Service, Tuesday, July 25, 1922, page 153, which contains a report that on July 24, 1922, Secretary Hoover submitted his plan for distributing coal to Attorney General Daugherty for an opinion on the legality of his plan, and that the Attorney General rendered an opinion to Secretary of Commerce Hoover sustaining the legality of his plan for distribution of coal at fair prices.

The power of Congress to fix prices for food and fuel is valid only in time of war or other great public peril.

As to the constitutionality of the National Defense (Lever) Act, entitled "An Act of Congress to provide further for the national security and defense by economizing the production, conserving the supply and controlling the distribution of food products and fuel," approved August 10, 1917:

In *United States v. Pennsylvania Central Coal Co.*, 256 Federal Reporter, page 705, the court says:

"We are engaged in a great war, involving not only the fundamental rights of the nation and her people, but, in case of an adverse issue, the very existence of the republic itself. This war, constitutionally declared by Congress, requires the raising, equipping, and supporting of armies and navies, of which the President of the United States is the commander in chief. That the safety of the republic is the first law, is as true now as when the Romans so declared. To the high office of commander in chief necessarily belong many inherent powers. He has authority, without any act of Congress to exercise all belligerent rights. He may institute a blockade, levy contributions on the enemy, and authorize the military commanders to form a civil and military government in the conquered territory. He may establish there courts of justice. When a state of war exists, the whole nation is pledged to its successful prosecution. Its resources must be controlled and conserved, that large armies may be maintained in the field. Restrictions which in times of peace would be oppressive and unlawful become in times of war a legal necessity. Prices must be regulated and controlled, that the strong may not oppress the weak, nor be permitted to extort unreasonable profits through the stress and exigencies of war. The section of the act of

Congress here in question, seeking to regulate the prices of coal and coke, is clearly a measure necessary for the efficient prosecution of the war; and, as the welfare of the nation is higher than the rights of any state, I cannot doubt that it is well within the constitutional power of Congress to enact."

The principal question raised in *United States v. Ford*, 265 Federal Reporter, page 424, is:

"Whether Section 25 of the National Defense (Lever) Act, authorizing the President to fix the price of coal during the continuance of the war, is unconstitutional, as depriving of property without due process of law.

"While the war created no new powers in Congress, it undoubtedly required the exercise of powers latent in times of peace. The right to regulate business, including the fixing of prices for essential commodities, in furtherance of a constitutional power of the United States, exists when the business sought to be regulated is one in which the public has an interest beyond that of the persons who participate in the individual transactions therein. Businesses which are purely private in times of peace may become matters of vital public concern in times of war. The late war was a marshaling, not only of the manpower of the nations engaged, but of their total resources and economic strength. The production and distribution of coal, the chief source of industrial energy, was a business in which the public had a vital interest over and above that of the individuals engaged in the particular transactions; therefore it was a business which Congress had the right to regulate. During the war, when the marshaling of the industrial powers of the nation was imperative, prompt action was demanded, and extended investigations, such as are necessary to judicial review of the economic orders essential to the prosecution of the war, were impractical and impossible; and, under the circumstances then existing, the fixing of prices in public industries necessary for the prosecution of the war, by the President, under the authority of the act of Congress was not the deprivation of due process of law; nor was the reposing of such power in the President unconstitutional, as a delegation of either legislative or judicial power."

The war time power of regulations and control terminated with the war. See *United States v. Hicks*, 256 Federal

Reporter, pages 707-708. Also 253 Federal Reporter, pages 772-777, where defendant was enjoined from disobeying the order of a state fuel administrator under the Lever Act, to continue furnishing plaintiff with coal till the act by its terms ceases to be in effect, by termination of the war, ascertained and proclaimed by the President.

On page 777, the court has this to say on the increase in price of coal over the fuel administrators order :

“To do so in war times, when the life and welfare of the country demand of us all every sacrifice for the common good, such a course becomes far more reprehensible. I am persuaded that to prevent just such lines of conduct was one of the purposes of Congress in the enactment of this Lever Act. No question is raised here as to its constitutionality, and I know of none that can be raised. Clearly it gives power to the President, through officers authorized to be and appointed by him, to so conserve and regulate the distribution of food and fuel in such way that greed and extortion should not run riot, and the ability of men, women, partnerships, and corporations to work for the successful ending of the country's conflict should not be either crippled or hindered.

“That Barnes, as state fuel administrator, is a government officer, charged with governmental duties and obligations, cannot be questioned. That the order issued by him on April 19, 1918, requiring this coal company to continue supplying the plaintiff with coal, was within the scope of his power and duties as such government officer, it also seems to me, cannot be denied, in view of the terms and requirements of this Lever Act. The primary duty and obligation of federal courts are to construe and enforce the federal laws. For this purpose they were created.

“It cannot be assumed that, because Congress did not expressly so provide, federal courts can shirk the responsibility of enforcing the administrative orders of the fuel administrators acting legally and rightly within the terms and requirements of this act. Therefore it is not only permissible, but an absolute obligation upon this court, upon the appeal here made, to see to it that this order of the state fuel administrator is enforced.

* * * ”

Food and fuel control act within power of Congress. *United States v. Oglesby Grocery Co. et al.*, 264 Federal Reporter, page 691.

Act August 17, 1917, etc., regulating the production and distribution of food and fuel, was within the power possessed by Congress in time of war in the nature of a police power. On page 692 the court says:

"1. The war powers of Congress must be held to be equal to whatever is necessary to successfully prosecute a war and maintain the public safety. In modern wars, not only armies and peoples, but industries, must be mobilized. Every citizen and every dollar must fight. Economic control is as important as military. Disaster and discontent at home are as fundamental and vital as in the field. The powers of Congress, in time of war, are comparable to the police powers of the states in time of peace, and equally incapable of fixed limits. No doubt is entertained of the original power to make this legislation.

"2. It is contended that the war power has expired, and this exercise of it has fallen by the cessation of war. An armistice was signed with Germany on November 11, 1918, and active fighting then ceased. The original act says that its provisions—

'shall cease to be in effect when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President.'

"No such proclamation has been made by the President. Instead, numerous proclamations have been made by him since the armistice in enforcement of this act. The Congress, itself, on October 22, 1919, amended the very section of it here in issue, and on December 31, 1919, enacted that its provisions as to domestic sugar should continue until June 30, 1920, and as to other sugar until December 31, 1920. The Congress and the President are the constitutional judges of states of war and peace and their decisions should be abided in patience by people and courts."

On the question of the time of the termination of the war, in the case of *C. A. Weed & Co. v. Lockwood, U. S. Atty.*, on page 785, it is said:

"War—Peace treaty not being ratified, state of war continued, so as to authorize Lever Act under war powers.

“At the time of the national enactment of the amendment to Lever Food Control Act on October 22, 1919, the Senate having failed to ratify the peace treaty with Germany, the state of war continued, and the emergency created thereby was still in existence, so that the amendment of that act to issue an adequate supply and adequate distribution of necessities, in view of scarcity caused by the war, was sustainable under the war powers of Congress.”

On page 788 the court says:

“Since we are still in a state of war, and the war time emergency has not expired, we are of the opinion that Congress could legislate, as it did, under the authority of its war powers, without contravening Article 1, § 8, Cl. 18, of the Constitution. During the recent war, the struggle between economic resources was all important. It did much to make for the morale of the army and navy. Food control, as a subject of war legislation, has been approved. *Hamilton v. Kentucky Dis. Co.*, 251 U. S. 160, 40 Sup. Ct. 106, 64 L. Ed.: Wearing apparel, declared to be one of the necessities, is well within this sphere of legislation. To so legislate does not interfere with the police powers of the state. Food and wearing apparel control, during a war emergency, are properly the subject for war legislation, and by limiting charges for such necessities Congress does not take property without due process of law. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 79. The court, speaking through Chief Justice Waite, there said:

“‘In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold.’

“Thus it will be observed that the Supreme Court pointed out that the state may fix prices on all commodities where the public has an interest. We think that, while a state of war exists Congress may declare that the public interest in the price of food and wearing apparel warrants legislation declaring an unreasonable and unjust rate or charge in handling or dealing in the necessities.”

On page 794, Hough, Circuit Judge, (concurring).

“With the main argument and conclusion of Judge Manton I agree, and what follows is but to emphasize some matters thought important. Whether ‘property rights are invaded’ is a question of degree. Yet oftentimes the degree of invasion is a test of equitable jurisdiction. Thus there is usually no difference in material kind between a single act of nuisance and a continuing nuisance. So here; for one making a sale a month might perhaps continue to exist in a business sense under this statute; he could find out whether he was a criminal before he was ruined. But a retail storekeeper, who cannot do a day’s business without running the risk of perhaps a thousand indictments, is suffering a very real invasion.

“When the Lever Act was amended, this country was and still is in a state that may be described as ‘official war.’ This is substantially the finding of the *Kentucky Distilleries Case*, *supra*. It may be likened to the European ‘state of siege,’ and continues in Congress all the war powers of the United States. If we were in a state of ‘official’ peace, this statute would in my judgment be unconstitutional, under *International Harvester Co. v. Kentucky*, 234 U. S. 216, 34 Sup. Ct. 853, 58 L. Ed. 1284. The condemnation there expressed (especially at page 223) is applicable here word for word. It would also be constitutionally obnoxious because it is a gross piece of class legislation; incapable of distinction from that condemned in *Connolly v. Union, etc., Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679. But the statute is begotten by war, and is constitutionally excused (*i. e.*, justified) by the war power, which is superior to, and not to be measured by, the police powers of the several states.

“Police powers generally are ‘nothing more nor less than the powers of government inherent in every sovereignty to the extent of its dominion.’ The *License Cases*, 5 How., at page 583, 12 L. Ed. 256. A state can neither declare nor conduct a war; the United States can, and the greater the sovereign the greater the power. The United States can conduct a war in its own way, and the national sovereignty, dominion, or war power extends to every war necessity, of which the Congress is the sole judge. Congress decides that the necessity exists, and meets it in its own discretion, subject only to some procedural restrictions in favor of personal liberty, indicated, but not delimited, by *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281, and kindred decisions.

“In regulating civil and commercial life in war time, the nation, through the Congress, is exercising the first law of nature, self-defense, whereof the limits are incapable of predetermination. But it is surely within those limits to fix prices by legislative fiat and punish every man varying therefrom; the present statute does not go that far, for practically it asks the usually soft-hearted jury to issue the fiat.”

It is reported that in the United States Senate a resolution was recently introduced known as Senate Joint Resolution 230, which provides for the appointment of a commission to investigate the present strike in the coal industry. Also in that connection, Senator William E. Borah of Idaho, introduced a bill (Senate 3865) in the Senate, Tuesday, July 25, 1922, legislative day Thursday, April 20, 1922, appearing on page 11573 of the Congressional Record. This provides for the establishing of a coal commission.

Our conclusions are therefore, that:

1. The state, in times of public danger and emergency, may exercise the power of eminent domain to the extent of seizing and operating the coal mines in this state. That power to be exercised by the General Assembly or some appropriate delegated state agency.

Laws should be enacted declaring the intention of the state to subject this property to the public use, designating the agencies by which the power is to be exercised, and providing a definite method for compensation to the owner, to satisfy the requirements of the rule stated above.

2. That the General Assembly, under the police power, may enact laws which provide for the regulation of this industry in time of public danger and emergency, and which provide for seizing and operating the mines, in case that is necessary to accomplish the purpose of the regulation.

3. That the federal government is without power during peace times to regulate the prices of food and fuel and the distribution thereof, except that insofar as the distribution may come within the provisions of the Interstate Commerce Act, and we therefore respectfully refer to the recent opinion of Attorney General Daugherty of the United States to Secre-

tary of Commerce Hoover, at his request, on or about July 24, 1922, which opinion purports to sustain the legality of the proposed plan of Secretary of Commerce Hoover for the distribution of coal at the present time under the provision of the Federal Interstate Commerce Act.

Very respectfully,
 EDWARD J. SMEJKAL,
Assistant Corporation Counsel.

Bonds Registered in The Name of Intestate Deceased.

August 15, 1922.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

We are in receipt of your letter in which you ask for advice concerning the disposition of certain bonds registered in the name of W. T. McMurry, deceased. It appears that during his lifetime Mr. McMurry registered Chicago River Improvement Refunding Bonds Nos. C254-C258 inclusive, amounting to a total of \$500.00, and that these bonds matured January 1, 1922. The bonds were registered July 20, 1915. Mr. McMurry died in January, 1920, intestate.

We are advised from the letter referred to us that before his death he directed that the bonds be given to his sister, Miss Alice McMurry, although there is no proof of this in the shape of memorandum or witnesses, and it would be very hard for Miss McMurry to establish such a fact under our laws which place a limitation on her testifying in such a case, and also put limitations on others interested in the estate in testifying.

We understand, however, that the estate is very small, that no administrator has ever been appointed, and that the heirs are willing that Miss McMurry should receive this money. The offer is made in the latter of the attorneys mentioned above to secure and forward to you a release from the heirs at law and next of kin of the deceased, together with proof of their number, names and ages.

Since the amount involved is only \$500.00 and some in-

terest, and no other claimant has appeared in more than two and one-half years, we believe it will be proper for you to accept proof of heirship such as is suggested by affidavit or otherwise, and release of the heirs and next of kin who may be interested in said estate and upon the receipt of same, the money may be paid out. Such proof of heirship and releases ought to be submitted to the Law Department for examination in order that you may be secure. We do not believe, however, in view of all the circumstances and the small estate involved that it is necessary to compel these parties to take out letters of administration. The only thing that would cause us to change our view in this respect would be if it should appear from the proof of heirship that there is a widow involved in which event we will advise you further.

Very truly yours,

LEON HORSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Lake Calumet Harbor, State Approval of Plan Adopted by
the City.**

August 29, 1922.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

The state's approval, so-called, of the city's plans with respect to Lake Calumet Harbor, in its present form is not responsive to the request or the needs of the city and, except for the admission that the city plan conforms with the provisions of the Lake Calumet Harbor Act of 1921, it is of no value to Chicago as it simply invites or permits the city to renew its request at some future time; and is, in fact, not in furtherance but in hinderance of the project and this especially with regard to the intimation therein contained that the land granted to the city by the state is subject to re-appropriation by the state, for slips, upon the will and act of its Department

of Public Works and Buildings, through requiring more slips as indicated in Paragraph 3 of the approval.

The Lake Calumet Harbor Act, approved June 24, 1921, provides, Section 1, page 184, that "A harbor, having a basin and slips, a depth of not less than minus 21.34 feet Chicago datum and a total area of not less than 500 acres of which not less than 300 acres shall be in the basin, may be constructed in and near Lake Calumet in the City of Chicago."

Section 2 provides that:

"Sec. 2. Certain terms used in this act shall be construed as follows:

(a) The term 'harbor' shall refer only to water-area and not to lands adjacent thereto."

Section 3 provides that:

"Sec. 3. A plan showing the form and location of such harbor may be prepared by the City of Chicago and submitted to the Department of Public Works of the State of Illinois for approval, and the approval of such plan by said department shall be conclusive evidence, for all purposes, that such plan in every respect conforms to the provisions of this act specifying the minimum areas of the harbor and of its basin, respectively. Such plan, after being so approved, shall not be changed except with the approval of said department. The harbor shall be constructed in strict accordance with such approved plan."

It is my opinion that by and under the 1921 act the duties of the Department of Public Works are confined, with respect to the Lake Calumet Harbor, (a) to determining that the city plan provides not less water area than the minimum prescribed by that act and (b) the matter of the shape or form of the harbor; and that, water-area and the shape thereof being approved, the act itself gives the city permission to build.

However, I understand that Mr. Sackett does not share my views and holds that Lake Calumet is subject to the general powers of his department over waterways and, certainly, the form of his present "approval" confirms my understanding. Assuming for the moment, without admitting it, that his

views are correct, what then is required of the city to make progress?

By the Civil Administrative Code of 1917 the Department of Public Works and Buildings has the power to exercise the rights, powers and duties vested in the Rivers and Lakes Commission of Illinois created by an act approved June 10, 1911, Hurd's Revised Statute, 1917, page 166, for, as appears from the act, the protection of the state waterways and the encouragement of their proper use, and by Paragraph 18 of this act it is provided that:

“It shall be unlawful to make any fill * * * or to do any work * * * in any of the public bodies of water * * * without first submitting the plans, profiles and specifications therefor, and such other data and information as may be required to the department * * * and receiving a permit therefor signed by the director of said department and authenticated by the seal thereof; * * *”

and Paragraph 26, Hurd's Revised Statute, page 168, provides that:

“* * * every proper use which the people may make of the public rivers and streams and lakes * * * shall be aided, assisted, encouraged and protected by the department * * *.”

A use which the Legislature (by the Lake Calumet Act of 1921) has authorized must be a proper use and one that is to be encouraged and assisted by the department. The city has submitted its plans. The work calls for no profiles or specifications—being simply the work of dredging to a certain depth within the harbor lines shown on the plan; and the department has not asked for profiles or specifications nor for data or information prior to taking its aforesaid action on the city's application for approval.

Whatever approval the city needs from the state it needs now and if the department has any objections to the city plans, or desires any data or information that the city can furnish, it should state them or ask for it and receive it now,

and give its approval in a form not subject to change at the department's later will.

Yours very truly,
BENTON F. KLEEMAN,
Assistant Corporation Counsel.

Approval:
SAMUEL A. ETTELSON,
Corporation Counsel.

Permits for the Erection of Filling Stations.

September 1, 1922.

HON. JOHN C. McDONNELL, Chief, Bureau Fire Prevention
and Public Safety.

Dear Sir:

We are in receipt of your request for an opinion relative to the validity of the following order, passed by the City Council, February 10, 1922, and found on page 1886 of the Journal of Council Proceedings of that date:

"Ordered, that the Commissioner of Buildings, the Chief of the Bureau of Fire Prevention and Public Safety and the Superintendent of Streets be, and they are hereby, directed not to issue any further permits for the erection of filling stations without first securing the approval of both aldermen of the ward in which the proposed filling stations are to be erected."

We are of the opinion that the above order is inoperative for three reasons: (1) That it unlawfully delegates to individual aldermen certain legislative powers which can only be exercised by the City Council as a body; (2) That it conflicts with a pre-existing *ordinance*, and being a mere *order* must yield to such *ordinance*; and (3) That, if it ever was a valid order, it must be held to have been repealed by the ordinance of May 3, 1922 (C. P., page 153), which was a complete enactment on the subject and purported to state all the conditions necessary for obtaining permits of the kind in question.

As to the first ground, our Supreme Court has repeatedly held that where the Legislature has conferred upon a City

Council authority to regulate any business, such regulation must be exercised by the council *as a body*, and it has no authority to delegate such regulation to any individual alderman or other officer or private citizen. The City Council itself must fix the precise terms upon which the business may be conducted and any regulations adopted must be uniform and apply equally to all parts of the city and to all persons therein who are similarly situated. The council may indeed authorize a ministerial officer to determine whether in a given case the terms so prescribed by the City Council have been complied with, but it can not authorize him to prescribe any additional terms or conditions not already fixed by the council, nor can it authorize him to withhold a permit at his own arbitrary will or pleasure.

If the above order of February 10, 1922, had merely authorized the alderman of the ward, prior to the issuance of a permit, to determine *whether the terms and conditions already definitely fixed by the City Council had been complied with*, there would perhaps have been little or no objection to it from this point of view. But, as we read it, the order purports to confer upon the aldermen of each ward full, absolute and arbitrary discretion to impose any additional terms they see fit and to refuse a permit upon any ground they choose. In other words, it delegates practically the entire regulation of that business to the individual aldermen of each ward. This the City Council can not lawfully do.

In the case of *City of East St. Louis v. Wehrung*, 50 Ill. 28, the Supreme Court said:

“As a general rule, where power is conferred upon municipal corporations to regulate any calling or business, *they are powerless to delegate a discretionary authority to others, or to an individual*. In creating such bodies it is designed to aid the government in the preservation of good order, and to protect more effectually persons in the particular community from injuries and annoyances that can not be so readily guarded against by general laws of the state. *And in conferring the power upon the corporate body, it is with the intention that it shall be exercised by the body created, and in the mode prescribed, and any departure from such authority, or any*

attempt by the body to transfer its powers to others is unwarranted."

In the case of *City of Chicago v. Trotter*, 136 Ill. 430, the court said:

"The powers that were granted by the state, and that are relied upon by the municipality, were delegated to the *City Council*, and that body could not transfer its legislative prerogatives, and the public trust which was imposed upon it, to a mere executive officer."

In the case of *Edwin B. Sheldon v. Maclay Hoyne*, 261 Ill. 222, the court said:

"Unlimited power, to be exercised in accordance with the whim or caprice of public officials, is inconsistent with our system of government. (*Moore v. Mayor of Danville*, 232 Ill. 307.)

"Any law that compels a man to hold 'any material right essential to the enjoyment of life at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.' (*Yick Wo v. Hopkins*, 118 U. S. 356.) Such arbitrary power is, under the settled rules of law in this and other jurisdictions, a delegation by the Legislature of its legislative functions to the officials in question and is therefore invalid. *Noel v. People*, 187 Ill. 587; *Cicero Lumber Co. v. Town of Cicero*, 176 *id.* 9; *City of Chicago v. Trotter*, 136 *id.* 430; *Commonwealth v. Maletsky*, 203 Mass. 241; *Little Chute v. Vancamp*, 136 Wis. 526; *State v. Tenant*, 110 N. C. 609."

Other cases to the same effect are:

People v. Sholem, 294 Ill. 204.

Wilder v. Aurora Traction Co., 216 Ill. 493, 522.

Lindblad v. Board of Education, 221 Ill. 271.

Noel v. People, 187 Ill. 587.

Cicero Lumber Co. v. Cicero, 176 Ill. 9.

Bibel v. People, 67 Ill. 172.

Yick Wo v. Hopkins, 118 U. S. 356.

Another reason which, in our opinion, renders the order in question invalid, is that it conflicts with an ordinance already in force. By an ordinance passed in 1915, the City Council had specified precisely the terms and conditions upon

which a party should be entitled to a permit of the kind here involved. This order undertakes to modify or amend that ordinance by prescribing a further condition, namely, that the consent of the aldermen of the ward must also be obtained. It is well settled that an ordinance can not be amended, modified or repealed by anything less than a *formal ordinance*. Neither an order nor a resolution is sufficient for this purpose.

Hibbard v. Chicago, 173 Ill. 91.

C. & N. P. R. Co. v. Chicago, 174 Ill. 439.

Galt v. Chicago, 174 Ill. 605.

Backhans v. People, 87 Ill. App. 173.

In *C. & N. P. R. Co. v. Chicago*, *supra*, our Supreme Court said:

“An ordinance can not be amended, repealed or suspended by a resolution. The act which amends should be of equal dignity with the act which enacts or establishes the law.”

And in *Hibbard v. Chicago*, *supra*, the court said:

“An ordinance of the city can only be repealed or amended by an ordinance of the city. A mere resolution or order of the City Council, not passed and published as an ordinance of the city, would not constitute a repeal of an ordinance duly passed. * * * A resolution of the City Council or an order of that body may be adopted as an order or resolution by *a majority of a quorum present*, but such order or resolution so adopted would not necessarily require the concurrence of *a majority of the members elected* in the City Council, and in this respect the adoption of an order or resolution materially differs from the adoption of an ordinance.”

Even if it could be said that the order of February 10, 1922, was valid when passed, it was, in our opinion, *repealed* by the ordinance of May 3, 1922, which (regardless of certain amendments since passed but not yet approved) constitutes a complete legislation on the subject and therefore must be held to contain all the terms and conditions necessary for the issuance of such permits.

For the reasons above stated we are of the opinion that

the order of February 10, 1922, is inoperative and void and may properly be disregarded.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Lumber Yard Licenses.

September 6, 1922.

HON. AGE ZYLSTRA, City Collector.

Dear Sir:

We are in receipt of your request for an opinion relative to whether you are authorized to collect the full license fee of \$200.00, as fixed by the ordinance of May 3, 1922, from Kemler Lumber Company for the privilege of maintaining a lumber yard, they having as yet paid no license fee for the year of 1922, although they have been operating a lumber yard all the year up to the present time. We note also their contention that the "act of May 3, 1922, cannot be retroactive" and that therefore they claim to be entitled to pay in accordance with the prior ordinance, as construed by them.

We can see no reason why the full fee should not be collected. The ordinance of May 3, 1922, makes the license fee for the year *one entirety* (and does not, for instance, apportion it by months or other less periods), and it does not authorize the collector to accept anything less than the entire fee, regardless of what time of the year the license is applied for.

As regards the Kemler Lumber Company's contention that "the act of May 3, 1922, can not be retroactive," we see no force to that. If the company had already taken out a license for the year 1922 before the ordinance of May 3, 1922, went into effect, and the city were now trying to collect an additional fee, or if they had gone out of business before May 3, and the city were trying to collect the new rate for the

period they were in business, they might reasonably have argued that the ordinance should not be construed as retroactive; but under present circumstances they cannot do so.

However, we do not wish to be understood as admitting that even if the ordinance were retroactive it would necessarily be invalid on that account. While retrospective legislation is not usually looked upon with favor, yet neither the constitution of this state nor that of the United States forbids *retroactive* laws, pure and simple. They forbid *ex post facto* laws, but that prohibition is confined to *criminal matters*, and does not affect civil matters.

“It is a well settled principle of construction, which is established by a long line of cases, that the constitutional prohibition against the passage of *ex post facto* laws applies only to penal or criminal matters. Laws which affect civil rights or which regulate civil remedies are not within the rule which prohibits the passage of *ex post facto* laws.”

12 Corpus Juris, 1099.

Other authorities to the same effect are:

Coles v. Madison Co., 1 Ill. 154.

Calder v. Bull, 3 Dall. (U. S.) 386.

Locke v. New Orleans, 4 Wall. (71 U. S.) 172.

Sturgis v. Carter, 114 U. S. 511.

Johanessen v. United States, 225 U. S. 227.

For the reasons above stated we are of the opinion that you are lawfully authorized to enforce the full annual license fee of \$200.00 against the Kemler Lumber Company and others similarly situated.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Permits for Tanks.

September 6, 1922.

HON. JOHN C. McDONNELL, Chief, Bureau of Fire Prevention
and Public Safety.

Dear Sir:

Replying to your request for an opinion relative to whether the ordinance requiring a permit for the installation of tanks for inflammable oils within the corporate limits of Chicago, applies also to tanks installed by the state and U. S. government, permit us to say that in our opinion it applies so far as the state government is concerned, but not so far as the United States government is concerned.

The policy of the United States government has always been, whenever, by the consent of a state, it acquires, by lease or purchase, any tract or piece of land within the limits of the same, to insist upon the condition that the state shall give it *sole and exclusive jurisdiction* over such land. In compliance with this policy our state Legislature passed the Statute of 1899, Section 2, of which reads as follows:

“That *exclusive jurisdiction* in and over any land so acquired by the United States shall be, and the same is *hereby ceded to the United States*, for all purposes except the administration of the criminal laws and the service of all civil processes of this state; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands.”

Hurd's Statutes, Chap. 143, Section 25.

As to the state government, however, a different principle applies. Our Supreme Court has repeatedly held that a city, in passing ordinances for the protection of life, health or morals (commonly called the “police power”), is performing a state and not a municipal function and that the officials enforcing such regulations are, to that extent, state and not municipal officers.

City of Chicago v. Wright, 69 Ill. 318.

Culver v. City of Streator, 130 Ill. 233.

City of Chicago v. Williams, 182 Ill. 135.

Johnston v. City of Chicago, 258 Ill. 494,

These officials, in the exercise of such police powers, are therefore legally as much a part of the "state government" as any other officers to whom that title is commonly applied, and in the lawful exercise of their governmental powers they cannot be ignored or disregarded by the latter.

The fact that certain premises may be state property is certainly no reason why the same should not be properly inspected or why human life thereon should not be safeguarded. The only question we are concerned with is, who are the proper officials to do this? In the case before us the state has not directly appointed any officials for such duty, but it has imposed upon the city the duty of appointing them; and when appointed, our Supreme Court says, they are state officers. In our opinion, therefore, they are the proper officials to perform such inspection and enforce the necessary safety regulations relative to such property, including, incidentally, the right to collect a reasonable fee for the services thus rendered.

For the reasons above set forth we are of the opinion that the ordinance relative to inflammable oils, applies to any tanks installed by any department or official of the state government, but does not apply to any tanks installed by the government of the United States, upon any land it has lawfully acquired.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Exemption from Water Rates.

September 7, 1922.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

We are in receipt of your request for an opinion relative to the legality of the claim of the Sanitary District of Chicago for exemption from water rates at premises 12501 Michigan

avenue and 129-59 East 124th Place. We are also in receipt of the copy of opinion from the acting attorney for the Sanitary District, which you enclosed, from which we note that they claim exemption under Paragraph J of Section 3 of the ordinance of July 8, 1921, (Council Proceedings, page 772) which reads as follows:

“That the Commissioner of Public Works is hereby authorized and directed to issue without fees or costs therefor to the Sanitary District of Chicago or to any contractor to whom the work or any part thereof specified in this ordinance shall be awarded, all permits or licenses required for doing said work, and shall not require from the Sanitary District of Chicago or its contractor, the deposit of any sums of money now required under the ordinances of the City of Chicago for similar work, and shall furnish free of cost to the Sanitary District of Chicago or to any contractor to whom said work or any part thereof shall be awarded at any existing water connection or hydrant all water needed in the performance of said work and further shall not require the payment by the Sanitary District of Chicago of any fees or salary for inspectors employed by the City of Chicago on said work.”

We believe that the words “said work” as used in the paragraph quoted means construction work and that accordingly the city merely promised the Sanitary District free water for such construction work but did not undertake to furnish them free water for the operation of the sewer after the same had been constructed. Our further view on this subject of exemption of the Sanitary District from water rates is set forth in our opinion to you under date of June 4, 1921, to which we beg respectfully to refer you.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Deduction of Amount Allowed Under Workmen's
Compensation Act from Pension.**

September 7, 1922.

THE RETIREMENT BOARD OF THE MUNICIPAL EMPLOYEES ANNUITY & BENEFIT FUND OF CHICAGO, Room 1005, City Hall, Chicago.

Gentlemen:

We are in receipt of your communication of August 21, 1922, in which you request us to advise you as to whether or not you should deduct the amount allowed by the Workmen's Compensation Bureau in the case of the widow of Frank A. Smith, a construction laborer in the Bureau of Engineering, Construction Division, who died as the result of an injury received while on duty.

From an investigation it appears that Frank A. Smith, an employe in the classified service of the City of Chicago, died as the result of an injury received while employed as a construction laborer in the Construction Division of the Bureau of Engineering, leaving him surviving his widow and one minor child under the age of 16 years. His widow filed a claim under the Workmen's Compensation Act, and the Industrial Board, in accordance with the provisions of Section 144 of the Workmen's Compensation Act, allowed her claim in the sum of \$4,000 to be paid at the rate of \$14 a week plus \$1 for a minor child under the age of 16 years, making a total of \$15 per week.

Mrs. Smith has now filed an application for a widow's compensation annuity, and, according to the figures submitted by the actuary of your board, the amount due her, under Section 33, which is the section of the law providing for annuity to the widow of a municipal employe whose death shall result from injury incurred in the performance of any act of duty, would be \$105 per month.

The question you desire us to rule upon is, whether or not you are authorized to deduct \$15 per week from the annuity of \$105 per month which she is entitled to under the Municipal Employees Annuity and Benefit Fund Act as the widow of an employe who died as the result of an injury received in the performance of duty.

Section 7 of Chapter 48, page 924, Smith's Illinois Revised Statutes, 1921, provides, in part, as follows:

“The amount of compensation which shall be paid for an injury to an employe resulting in death shall be (a) if the employe leaves any widow, child or children whom he was under legal obligations to support at the time of his injury, a sum equal to four times the average annual earnings of the employe but not less in any event than one thousand six hundred and fifty dollars, and not more in any event than three thousand seven hundred and fifty dollars * * *; provided, however, that in case a widow and one child under the age of 16 years at the time of the death of the employe survive, the sum of four thousand dollars shall be paid.”

The sum of \$4,000 awarded by the Workmen's Compensation Bureau to the widow of Frank A. Smith was compensation to her for the loss of his life and has no connection whatever with any annuity she may be entitled to under the terms and provisions of an act entitled “An Act to provide for the creation, setting apart, maintenance and administration of a municipal employes annuity and benefit fund. Section 33 of the said fund expressly provides that the widow of a municipal employe whose death shall result from injury incurred in the performance of any act of duty shall be 60 per cent of the salary of such employe as such salary shall be at the time of the injury of such municipal employe, and that compensation annuity equal in amount to the difference between the amount of the annuity provided for such widow, in accordance with the provisions of other sections of the act, and an amount equal to 60 per cent of the salary as aforesaid of such municipal employe shall be provided for and paid to such widow until the time when such municipal employe, if alive, would have attained the age of 65 years, and that thereafter, in the case of any such widow for whom the amount of an annuity provided in accordance with the provisions of the foregoing sections of this act, shall not be equal to the amount of annuity to which such widow would have had a right if such municipal employe would have lived and continued in the service upon salary at the rate of his final salary until he would have attained an age of 65 years, as of

her age as it would be on the date when such municipal employe would have attained such age of 65 years, in accordance with the provisions of Section 26 or Section 27 of this act, which ever such section shall apply to the case of the widow concerned. Section 33 also provides that supplemental annuity equal in amount to the difference between the amount of annuity provided for such widow under the provisions of the foregoing sections of this act and the amount of annuity to which such widow would have had a right if such municipal employe had lived and continued in the service upon salary as stated in this section until he attained an age of 65 years shall be provided for and paid to such widow. To provide such supplemental annuity the city shall contribute to the annuity and benefit fund herein provided for such equal sums annually from and after the date of the death of such municipal employe, that, when improved by interest at the rate of 4% per annum, the accumulated amount resulting from such sums will be sufficient, at the time payment of compensation annuity to such widow shall cease, to provide supplemental annuity as stated for such widow throughout her life thereafter.

There is no provision in the Municipal Employees Annuity & Benefit Fund Act directing a deduction of payments made under the provisions of the Workmen's Compensation Act from the amount awarded as a widow's compensation annuity to the widow of a municipal employe who dies as a result of injury in the performance of duty.

It is, therefore, our opinion that the widow of Frank A. Smith is entitled to receive the full amount of annuity allowed her by your board, and that you have no right to deduct from that any payments made to her as the result of an allowance to her by the Industrial Board under the provisions of the Workmen's Compensation Act.

Yours truly,

JAMES W. BREEN,
First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Method of Proper Accounting in Police Pension Fund.

September 8, 1922.

MESSRS. HASKINS & SELLS, Certified Public Accountants,
Harris Trust Building, Chicago, Illinois.

Gentlemen:

We are in receipt of your communication informing us that during the year 1921 the city credited the Police Pension Fund with the following items:

Receipts from the sale of lost and stolen property	\$12,953.46
Special police details	291.27
	\$13,244.73

and calling our attention to Section 957, Smith's Revised Statutes of Illinois, 1921, page 361, which reads as follows:

"To defray the cost of administration of the annuity and benefit fund herein provided for during the calendar year that this act shall become in effect in such city, the City Council of such city shall provide a sum not in excess of seven thousand dollars (\$7,000.00) from any monies available for such purpose."

In your oral conversation with us you requested us to advise you if the sum of \$13,244.73, which is the amount that the city credited to the Police Pension Fund during the year is not in excess of that provided by the section of the statute which we have quoted. In reply, we desire to advise you that the provisions of Section 957 are limited to the calendar year in which this act shall come in force and effect, and that the act of the General Assembly entitled, "An Act to provide for the creation, setting apart, maintenance and administration of a policemen's annuity and benefit fund in cities having a population exceeding 200,000 inhabitants," approved June 29, 1921, did not become effective until January 1, 1922.

Section 995 of said act, Chapter 24, Smith's Revised Statutes, 1921, page 375, provides, in part, as follows:

"It is the intention of this act that the annuity and benefit fund herein provided for shall on the first day in the month of January of the first year after the year in

which this act shall come in force and effect in such city, and thereafter, supersede and take the place of any police pension fund which shall be in operation, in such city, under and by virtue of an act entitled, "An Act to provide for the setting apart, formation and disbursement of a police pension fund in cities having a population exceeding two hundred thousand inhabitants," approved June 29, 1915, in force July 1, 1915, as subsequently amended, at the time this act shall come in force and effect in such city. Therefore, if any police pension fund created and maintained under and by virtue of said act, as subsequently amended, shall be in operation in any such city at the time this act shall come in force and effect in such city, all moneys, securities and other assets of such fund shall be transferred, on the first day of the month of January of the first year after the year in which this act shall come in force and effect in such city, by the board of trustees of such fund to the retirement board of the annuity and benefit fund herein provided for, which retirement board is hereby empowered such fund to the Retirement Board of the Annuity and Benefit Fund herein provided for and such police pension fund shall then cease to exist. If it shall not be possible or practicable for the board of trustees of any such police pension fund to transfer all moneys, securities and other assets of such fund to the said Retirement Board on the first day in the month of January of the first year after the year in which this act shall come in force and effect in such city, all such moneys, securities and other assets shall be transferred to said Retirement Board as soon as possible and practicable after such day, and any such transfer shall be made as of such day.

"All annuities, pensions and other benefits allowed prior to the first day in the month of January of the first year after the year in which this act shall come in force and effect in such city, by the board of trustees of such police pension fund shall thereafter be paid by the said Retirement Board from the annuity and benefit fund herein provided for, according to the law or laws under which such annuities, pensions, or other benefits were allowed."

Section 10 of an act approved June 29, 1915, in force July 1, 1915, as amended, page 474, Chapter 24, Hurd's Revised Statutes of 1919, provided, in part, as follows:

“In addition to the other powers herein granted, the following further powers and authority are hereby conferred upon said board:

“First: The said board shall have exclusive control and management of the fund mentioned herein, and of all moneys donated, paid or assessed for the relief or pensioning of disabled, superannuated and retired policemen, their widows and minor children; the same to be placed by the treasurer of such board to the credit of such fund subject to the order of such board.

“Second: All rewards, moneys, gifts, fees or emoluments that may be paid or given for, or on account of, extraordinary service by said police force or by any policeman, except when allowed to be retained by said policeman, or given to endow a medal or other competitive reward, shall be paid into said pension fund. The said board may take, by gift, grant, devise or bequest, any moneys, real estate, personal property, right of property or other valuable thing.

“Third: All moneys paid for special detail of policemen, fines imposed upon policemen of such city, for violation of the rules and regulations of the Police Department, and moneys received from all sales of unclaimed or stolen property.”

We desire to advise you that the above provisions of the statute appearing in the act entitled, “An Act to provide for the setting apart, formation and disbursement of a police pension fund in cities having a population exceeding two hundred thousand inhabitants,” approved June 29, 1915, in force and effect July 1, 1915, as subsequently amended, remained in full force and effect until January 1, 1922, on which date an act entitled, “An Act to provide for the creation, setting apart, maintenance and administration of a policemen’s annuity and benefit fund in cities having a population exceeding two hundred thousand inhabitants,” superseded the said act.

The city comptroller, therefore, properly credited to the Police Pension Fund all the receipts from the sale of lost and stolen property during the year of 1921 and all receipts from special police details.

You will find from an investigation that the comptroller has not credited to the Police Pension Fund during the year

of 1922 any miscellaneous receipts whatsoever, and that the Police Pension Fund has not received from the city during the year of 1922 any revenue in excess of the sum of \$7,000 provided for in Section 957 of Smith's Revised Statutes above quoted.

I desire to call your attention to the fact that on February 10, 1922, the City Council, in passing the Annual Appropriation Bill (page 1965 of the Journal of the Proceedings of the City Council of said date), in conformity with a request from the Retirement Board of the Policemen's Annuity & Benefit Fund of Chicago, provided for a tax levy of \$3,300,000 for the purpose of providing revenue for the annuity and benefit fund created by an act of the State of Illinois entitled, "An Act to provide for the creation, setting apart, maintenance and administration of a policemen's annuity and benefit fund," and in addition thereto provided appropriation of \$7,000, as provided in Section 957 of said act, to defray the cost of the administration of the said annuity and benefit fund during the first calendar year when said act came in force and effect in the City of Chicago, which, as we have above stated, was the year 1922 and not 1921.

Yours very truly,

JAMES W. BREEN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Disposition of Wheel Tax Fund.

September 8, 1922.

HON. CHARLES R. FRANCIS, Commissioner of Public Works:

Dear Sir:

We are in receipt of your communication of September 6, 1922, in which you advise us that the City Council appropriated in the Annual Appropriation Bill \$2,250,000 from the revenue to be derived from the collection of wheel tax, which amount the council estimated would be the amount derived

from the collection of wheel tax during the year of 1922. Your communication also advises us that during the first eight months of the current year there has been collected from wheel tax revenue some \$2,435,061.16, and that a conservative estimate of the collections for the remaining four months of the year is \$75,000, or a total of more than \$2,510,000, which will be approximately \$260,000 more than the City Council anticipated when it passed the Annual Appropriation Bill, and that it will not be possible for you to make the street repairs ordered by the City Council and other necessary street repairs not included in council orders and still keep within the council appropriation.

We have carefully noted the contents of your communication and, much as we would like to find some way to enable you to make all the street repairs you deem it important to make during the current year, it is impossible, under the law, for us to do so.

Paragraph 89 of the Cities and Villages Act requires city councils and boards of trustees of villages within the first quarter of each fiscal year to pass an ordinance termed the Annual Appropriation Bill, appropriating such sums as may be deemed necessary to defray all necessary expenses and liabilities of the corporation. The ordinance is required to specify the objects and purposes for which the appropriations are made, and the amount appropriated for each object or purpose. The statute also provides that no further appropriation shall be made at any other time within such fiscal year unless the proposition to meet each appropriation has been first sanctioned by a majority of such city or village either by a petition signed by them or at a general or special election duly called therefor, with a proviso, however, that in cities or villages having a population of 100,000 or more the city councils or boards of trustees, as the case may be, within any time within the first half of the fiscal year, by a two-thirds vote of all members of such body, may pass additional or supplemental appropriation ordinances making appropriations from any receipts derived from any other source than the annual taxes levied in accordance with law.

Section 90 of Article VII of the Cities and Villages Act provides that neither the City Council nor the Board of Trustees nor any department or officer of the corporation shall add to the corporate expenditures of any one year anything over and above the amount provided for in the Annual Appropriation Bill of that year, and that no expenditure for an improvement to be paid for out of the fund of the corporation shall exceed in any one year the amount provided for such improvement in the Annual Appropriation Bill.

In discussing the power of the City Council to make appropriations from miscellaneous receipts after the passage of the annual appropriation bill, the Supreme Court, in the case of the *People v. Sergel*, 269 Ill. 621, said:

“Appellee’s contention is that construing these paragraphs together they were intended to require that the appropriation ordinance passed during the first quarter of the fiscal year should appropriate only the revenues and funds of the corporation received from taxation; that as to receipts from miscellaneous sources they may be appropriated for the payment of current expenses at any time during the fiscal year. If this position is correct, then the annual appropriation ordinance passed during the first quarter of the fiscal year and the tax levy would be for the same amount, or, at least, there would be no necessity for the appropriation exceeding the amount of the tax levy. The provisions of the statute referred to are mandatory and have been held to have been enacted for the protection of the taxpayers. (Citing *City of Chicago v. Nichols*, 177 Ill. 77; *People v. Florville*, 270 Ill. 79.) * * * The statute, by language plain and unambiguous, limits the expenditure of corporate funds to the amounts appropriated during the first quarter of the fiscal year for the respective corporate purposes mentioned in the appropriation ordinance and prohibits any other appropriation being made at any other time within such fiscal year.”

Since this decision was rendered by the Supreme Court the statute has been amended authorizing the City Council to make appropriations from miscellaneous receipts during the first half of the fiscal year, and under this amendment the City Council had power to make additional or supplemental appropriations from miscellaneous receipts after the

passage of the annual appropriation bill and up to and including June 30, 1922. The first half of the fiscal year having now passed, however, the Council is without power to make any additional appropriation from the revenue of the city derived from the collection of wheel tax.

You are, therefore, advised that it is contrary to law for you to expend any money derived from the collection of wheel tax during the year 1922 in excess of the amount appropriated by the City Council for said year.

Yours very truly,

JAMES W. BREEN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Service Annuity of Retired Policeman.

September 9, 1922.

TO THE RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY &
BENEFIT FUND OF CHICAGO.

Gentlemen:

We are in receipt of the application of John Cunningham, dated May 23, 1922, in which he applies for a service annuity and alleges that he has completed a service of 20 years and is over 50 years of age.

An investigation of the record of the said John Cunningham discloses that he was appointed a patrolman in the Police Department of the City of Chicago on June 21, 1890; that on May 2, 1904, while in the performance of police duty, he was in the vicinity of West Madison street, a short distance east of Rockwell street, when his attention was attracted by a number of Union Traction employes attempting to push a street car forward over some defective portions of the street that were being repaired and which were in such condition that the horses could not draw the car. Cunningham attempted to assist in pushing the car forward, and in doing so stepped on some small stones which caused him to slip and

his right foot was crushed by the car. He was removed to the County Hospital, where the surgeons found it necessary to amputate his leg. On January 25, 1909, he applied to the Board of Trustees of the Police Pension Fund for a disability pension, and on April 13, 1909, his application for a disability pension was granted and he received a pension of \$50 per month.

On the date that Cunningham was placed upon the disability pension roll, viz., April 13, 1909, he had completed a service of 18 years 9 months and 21 days, and, under the law then in force and effect, could not be pensioned at that time except for disability. The pension law in force and effect on the date that Cunningham was pensioned provided that persons pensioned for disability should report monthly to the superintendent of police and hold himself in readiness for the performance of any police duty that the superintendent, in his discretion, might determine that the disability pensioner was capable of performing. The law also provided that upon the termination of the disability of any pensioner the Police Pension Board should enter an order reinstating the said person upon the active roll of the Police Department.

In order for Cunningham to be entitled to a service annuity he must have completed a service of 20 years in the Police Department prior to the date of his application for a service annuity, and, in order to ascertain whether or not Cunningham had completed a service of 20 years prior to the 23rd day of May, 1922, when he filed his application for a service annuity, it is necessary for us to determine whether or not he is entitled to credit for services from April 13, 1909, down to and including the 23rd day of May, 1922. Section 49 of an act entitled, "An Act to provide for the creation, setting apart, maintenance and administration of a policemen's annuity and benefit fund in cities having a population exceeding 200,000 inhabitants," approved June 29, 1921, in force and effect January 1, 1922, appearing on page 302, Laws of Illinois, 1922, reads as follows:

"In computing the term of service rendered by any policeman prior to the first day in the month of January of the first year after the year in which this act shall

come in force and effect in such city, the following periods of time shall be counted, in addition to all periods of time during which such policeman shall have performed the duties of his position, as periods of service for annuity purposes only: All periods of vacation, all periods of leave of absence with whole or part pay, all periods of leave of absence without pay which were necessary on account of disability.

“In computing the term of service rendered by any policeman subsequent to the thirty-first day in the month of December of the year in which this act shall come in force and effect in such city, the following periods of time shall be counted, in addition to all periods of time during which such policeman shall have performed the duties of his position, as periods of service for annuity purposes only: All periods of vacation, all periods of leave of absence with whole or part pay, all periods of disability for which such policeman shall receive any disability benefit, and all periods of disability for which the policeman concerned shall receive whole or part pay.”

Under the above provisions of the statute Cunningham is entitled to have counted for annuity purposes the period of time elapsing between April 13, 1909, when he was placed upon a disability pension down to and including the present date, September 9, 1922, which amounts to 12 years 5 months and 9 days, which, added to his prior service period of 18 years 9 months and 21 days, would entitle him to be credited with a period of service of 31 years and 3 months. .

The act providing for the creation, setting apart, maintenance and administration of a policemen's annuity and benefit fund in force and effect January 1, 1922, for annuity purposes, divided the Police Department into two classes, to be known as the “future entrant” class and the “present employe” class, and in Section 12 of the said act the classes are defined as follows:

“‘Future Entrant’: Any policeman who shall be employed as a policeman of such city for the first time on or after the first day in the month of January of the first year after the year in which this act shall come in force and effect in such city.

“‘Present Employe’: Any policeman who shall be

in the employment of such city as a policeman thereof on the thirty-first day in the month of December of the year in which this act shall come in force and effect in such city."

Under the above definitions it is necessary to hold that Cunningham must be classified as a "present employe" of the Department of Police.

Section 55 of the Annuity and Benefit Fund Act, page 309, Laws of Illinois 1921, which defines the amount of annuity that a present employe who has completed a service of 20 years and has reached the age of 50 years, shall receive, reads as follows:

"Notwithstanding the provisions of any foregoing section or sections of this act, any present employe who shall resign or be discharged from the service on or after the first day in the month of January of the first year after the year in which this act shall come in force and effect in such city, and after he shall have completed twenty (20) or more years of service and for whom the amount of annuity provided in accordance with the foregoing provisions of this act shall be less than the amount stated hereinafter in this section shall have a right to receive annuity as follows:

"Any such present employe who shall be fifty (50) or more years of age at the time of his resignation or discharge from the service shall have a right to receive annuity, from and after the date of such resignation or discharge, of an amount equal to fifty (50) per cent of the salary of such present employe as such salary shall be at the time of his resignation or discharge from the service.

"Any such present employe who shall be less than fifty (50) years of age at the time he shall resign or be discharged from the service shall have a right to receive annuity, from and after the date upon which he shall become fifty (50) years of age, of an amount equal to fifty (50) per cent of the salary of such present employe as such salary shall be at the time of his resignation or discharge from the service but not in excess of the sum of nine hundred dollars (\$900.00) a year."

Our conclusions are that the said John Cunningham must be classified as a present employe in the Police Department of the City of Chicago, that he has completed a service of

20 years as such and has reached the age of 50 years and is, therefore, entitled to be granted a service annuity in conformity with the provisions of Section 55 above quoted.

We return herewith your enclosures.

Yours very truly,

JAMES W. BREEN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Interpretation of Oil Ordinance.

September 12, 1922.

HON. JOHN C. McDONNELL, Chief, Bureau of Fire Prevention
and Public Safety.

Dear Sir:

Replying to your request for an interpretation of certain provisions of the oil ordinance, we beg to submit the following answers to the questions propounded:

“Q. 1. Is a garage limited to the storage of oils not to exceed 1,065 gallons?”

Ans. No. But the garage license relieves the licensee of the duty of paying any oil station license on the first 1,065 gallons.

“Q. 2. If a person or concern operating a garage under a garage license desires to store, sell, offer for sale or distribute inflammable liquids from a tank of a capacity in excess of 1,065 gallons is there any reason why such business should not be classed as two businesses; a garage and a filling station?”

Ans. Whether we call it one business or two is perhaps largely a matter of phraseology. But, as we understand the ordinance, it considers such occupation *one* business (namely, garage business), but with additional fees where the amount of oil carried exceeds 1,065 gallons.

Section 5 of the Filling Station Ordinance says:

“A garage license issued in accordance with Article VIII of The Chicago Code of 1911, as amended, or a

peddler's license issued in accordance with Article LIV of The Chicago Code of 1911, as amended, *shall be deemed to include a license for a filling station.*"

"Q. 3. When a garage keeps, sells, offers for sale or distributes inflammable liquids from a tank or tanks of a capacity in excess of 1,065 gallons, should not an additional fee to the fee for operating a garage be charged for the tankage in excess of 1,065 gallons as provided in the filling station ordinance?"

Ans. Most certainly.

"Q. 4. If your answer to Question 1 is 'YES' should a person operating a garage and desiring to store oil in excess of 1,065 gallons be required to get a majority of the feet frontage within 150 feet parallel to the lot or plot of ground used for filling station purposes?"

Ans. Our answer to Question 1 being "No," we must answer "No" to this question also. After a person has once secured a license for a filling station (and a garage license includes that privilege) the ordinance does not seem to require frontage consent for the right to increase his oil supply, though it does require the payment of an additional fee.

"Q. 5. In figuring the total capacity of tanks or containers for the purpose of licensing under or over capacities of 1,065 gallons, should a portable wheel tank, which contains about fifty gallons, be taken into consideration? In other words regardless of the quantity of inflammable liquid in tankage other than portable wheel tank, would I be justified in charging Fifteen Dollars for each wheel tank?"

Ans. Garage owners are exempt from all filling station fees until the total capacity of *all* their oil tanks and containers exceed 1,065 gallons. With this exception, however, a fee of \$15.00 is required for each portable wheel tank, regardless of what the capacity of the other tanks and containers of the license may be.

"Q. 6. Can there be such a condition as 'Initial' storage tanks in a garage or retail filling station? Does not 'Initial' storage refer to and only mean oil yards used exclusively by an oil concern as a wholesale distributing station or warehouse?"

Ans. We agree with you.

"Q. 7. Also advise me if that part of the oil ordi-

nance, Section 5, Paragraph b, regarding 'garages and existing *manufacturing plants* where such oils are incidental to the business conducted' applies to an auto sales station, auto repair shop or auto accessory store or shop so as not to require frontage consents similar to existing garages."

Ans. We do not believe that the stores and shops you mention can properly be classed as "manufacturing plants," and if they desire to install oil tanks of more than 50 gallons capacity, we believe they are required to obtain the specified frontage consent.

Trusting the above replies are satisfactory, we are,

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Confidential Information Concerning Venereal Diseases.

September 16, 1922.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

Replying to your request for an opinion relative to whether your department is required to give information relative to venereal disease cases, in response to *subpoenas duces tecum* or demands from the state's attorney, the Board of Pardons, the Industrial Commission, etc., we beg to submit the following:

Section 1193 f of the ordinance of June 29, 1917 (Section 1819 of The Code of 1922, now in press), which you refer to, reads as follows:

"All information and reports concerning persons infected with venereal diseases shall be confidential and shall be inaccessible to the public, except in so far as publicity may attend the performance of the duty imposed upon the commissioner of health by the preceding section of this ordinance."

If this ordinance were a *statute* instead of an ordinance your question would be comparatively easy to answer, but now it is complicated by the question as to the power of the City Council to pass such an ordinance.

It will be noted that the ordinance purports to change a common law *rule of evidence* and make communications between physician and patient, in the class of cases specified, *confidential*, or *privileged communications*,—something which they were not at common law.

“At common law there was no privilege as to communications between physicians and patient and this rule still prevails where not changed by statute; but at the present time the disclosure by a physician, concerning the patient or communications from the patient or information concerning the patient acquired by the physician in his professional capacity is very generally forbidden by statute.”

40 Cyc. 2381.

We have no such statute in this state, however. But an ordinance, if duly passed in pursuance of proper authority, is a law within the municipality of the same force and effect as a statute.

King v. Davenport, 98 Ill. 305.

Wright v. C. & N. W. Ry. Co., 7 Ill. App. 438.

Lindblom v. Doherty, 102 Ill. App. 14.

While the City Council has not been, in express language, empowered to pass such an ordinance, its authority to pass health ordinances is very broad. Paragraphs 76, 77 and 78 of Sec. 1 of Art. V of the Cities and Villages Act give the City Council power:

“*Seventy-sixth.* To appoint a board of health, and prescribe its powers and duties.

“*Seventy-seventh.* To erect and establish hospitals and medical dispensaries, and to regulate hospitals, medical dispensaries, sanatoria and undertaking establishments, and to direct the location thereof.

“*Seventy-eighth.* To do all acts, make all regulations which may be necessary or expedient for the promotion of health or suppression of disease.”

This provision of the statute has always been very broadly construed, indeed, more broadly than any other provision of the Cities and Villages Act.

In *Gundling v. City of Chicago*, 176 Ill. 340, our Supreme Court, in construing the above paragraphs, said:

“When the City Council considers some occupation or thing dangerous to the health of the community, and in the exercise of its discretion passes an ordinance to prevent such a danger, it is the policy of the law to favor such legislation as being humane and essential to the preservation and protection of the community. *Municipalities are allowed a greater degree of liberty of legislation in this direction than any other.*”

And in *Kay v. City of Chicago*, 263 Ill. 122, the Supreme Court said:

“Courts can not overrule the determination by the City Council that a particular method of protecting the public health should be adopted unless it is so clearly and manifestly wrong that there can be no doubt about it.”

To the same effect is the case of *City of Chicago v. Drogasawacz*, 256 Ill. 34, where the court said:

“One of the most important of police powers is that of caring for the health of a community.”

That it is very essential to the suppression of the class of diseases mentioned in the ordinance, that the Health Department should secure full and complete information relative to individual cases of the same, and that such information can not ordinarily be secured unless it will be treated as confidential, we do not believe that anyone will dispute. We are therefore of the opinion that the power to declare such information to be confidential or “privileged communication” comes fairly within the power conferred upon the City Council by the statute above quoted, and that the ordinance therefore is a valid law of the City of Chicago.

While it may be true that the ordinance, in a certain sense, touches upon what is ordinarily classed as rules of evidence, yet it is also true that it affects *substantial rights* of citizens and residents of the City of Chicago.

However, rules of evidence are no more sacred than any other laws (where no constitutional rights are involved), and if it is necessary to the suppression of certain diseases that the city maintain control of, and hold confidential, the evidence gathered by its own officers and agents relative to the physical ailments of certain of its citizens, residents and so-journers (which is all that the above ordinance provides), we can see no reason why the city should not have the right to do so, considering that the statute authorizes it:

“to do *all* acts, make *all* regulations which may be *necessary* or *expedient* for the promotion of health or suppression of disease.”

Granted, then, the validity of the ordinance, we do not believe there can well be any doubt about the interpretation of the same. The expression “confidential communication,” or, as it is also called, privileged communication, has a well defined meaning in law. In all states where communications between physician and patient have been made, by statute, confidential communications, the same rule applies as in the case of confidential communications between attorney and client.

Westover v. Aetna L. Ins. Co., 99 N. Y. 56.

Raymond v. Burlington, etc., R. Co., 65 Ia. 152.

Aetna L. Ins. Co. v. Deming, 123 Ind. 384.

In the case of *Chirac v. Reinicker*, 11 Wheat. (24 U. S.) 280, Mr. Justice Story, in delivering the opinion of the court, said:

“The general rule is not disputed, that confidential communications between client and attorney, are not to be revealed at any time. The privilege, indeed, is not that of the attorney, but of the client; and it is indispensable for the purposes of private justice. Whatever facts, therefore, are communicated by a client to counsel, solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent.”

In *People v. Barker*, 56 Ill. 299, the court said:

“We know of no exception to the rule, that communications made to a counsellor, attorney or solicitor,

when made to him in the character of a legal adviser, are to be protected, as the privilege of the party seeking the advice. The rule is founded on principles of public policy. It has been found necessary to the protection of persons surrounded or embarrassed by difficulty, to the end that they may have the advice and counsel of persons skilled in the law, upon a complete disclosure of all that pertains to the transaction that affect their interest, property or liberty, with the full assurance that the communications thus made are as safe with their legal adviser as within their own breasts. *The courts will never compel, or even allow, an attorney to disclose facts thus communicated to him by his client.*"

In the State of New York, where the statute has extended the same rule to confidential communications between physicians and patients, the court says:

"It is thus seen that physicians and attorneys are not only *absolutely prohibited* from making the disclosures mentioned, but that by an entirely new section it is provided, that the seal of the law placed on such disclosures can be removed only by the express waiver of the persons mentioned. * * * In *Pierson v. People* (70 N. Y. 424), it was said: 'The plain purpose of this statute was to enable a patient to make known his condition to his physician without the danger of any disclosure by him which would annoy the feelings, damage the character, or impair the standing of the patient while living, or disgrace his memory when dead.'"

Westover v. Insurance Co., 99 N. Y. 56.

In Iowa, where a similar statute has extended the above rule to physicians, the court said:

"We conclude that the prohibition of Section 3643 is not confined to verbal communications, but it extends to facts which are learned by a physician in the discharge of his duties, from his own observations and examination of the patient. If the facts thus learned are of a confidential character, and are necessary and proper to enable the physician to discharge his professional duty to his client, they are protected. * * * The information received from his associate was necessary to enable him to discharge his duty properly, and can not be used for any other purpose. It is protected by the statute."

Prader v. Accident Association, 95 Iowa 149.

To the same effect is the case of
Aetna L. Ins. Co. v. Deming, 123 Ind. 384.

The privilege above mentioned is not the privilege of the attorney or physician, however, but the privilege of the client or patient, as the case may be, and if the latter should agree to waive the privilege, the former can not refuse to testify concerning the matter.

Hunt v. Blackburn, 128 U. S. 464.

People v. Barker, 56 Ill. 299.

Scott v. Harris, 113 Ill. 447.

People v. Marcofsky, 219 Ill. App. 230.

We are of the opinion, therefore, that the information mentioned in the ordinance can not lawfully be divulged by your department, either in or out of court; that you would be violating the law if you did so; that if summoned into court, by a *subpoena duces tecum* or otherwise, it is your duty to refuse to answer any questions or produce any documents which would disclose any information declared confidential by the ordinance. (In so refusing to testify, or refusing to obey the *subpoena duces tecum*, you should always state to the court the ground upon which you refuse, namely, that it is confidential information which the ordinance forbids you to reveal.) What applies to testimony in court, applies also to information sought by the state's attorney, the Board of Pardons, etc. For, needless to say, where the court can not compel you to testify, no other officials can. In all the instances mentioned it is your duty under the ordinance to refuse to divulge any information or reports gathered by your department concerning persons afflicted with venereal diseases, unless the persons themselves shall first consent thereto.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Garage License 2340 N. Talman Avenue.

September 16, 1922.

HON. AGE ZYLSTRA, City Collector.

Dear Sir:

We have your letter of September 12, 1922, in which you state that a building which consists of one large room is rented to six persons for the purpose of keeping their automobiles; that each person so renting space has his own key and that the persons storing their cars there receive no service from the owner or occupant of the premises but that they merely rent space in which to keep their respective cars.

Answering your inquiry as to whether or not such a place should be classed as a garage we advise you as follows:

“2683. GARAGE DEFINED.) The word ‘garage’ as used in this article shall be held to mean, and is hereby defined as meaning, any barn, stable, building or other place within the city where automobiles, autocars or any similar self-propelled vehicles are kept or let for hire or reward to any person, whether such vehicle be so hired out or let with or without an operator for same, or where such vehicles are kept ready for use and where rent is paid to the keeper thereof for such keeping.”

In the above section there are two separate classes of buildings which are included within the term defined. One is a place where motor vehicles are kept or let for hire. The other is a place where such vehicles are kept, ready for use, and a rental is paid.

As to the second class, two things must be present in order to bring the place within the ordinance definition of a garage. It must be a place (1) Where such vehicles are kept ready for use (and we construe vehicles kept ready for use as meaning vehicles kept with the intention and purpose of using them, as distinguished from vehicles kept in store-houses or salesrooms and not in use), and (2) where rent is paid to the keeper of such vehicles for such keeping. The keeping referred to is manifestly a keeping by some one other than the owner of the vehicle. It is such keeping as entitles the keeper to be paid a compensation therefor. Such a keeper

must necessarily have the vehicle in his custody and sustain the relation of bailee thereto. The condition expressed in the ordinance is "where rent is to be paid to the keeper thereof *for such keeping.*" It is to be observed that the rent is to be paid for the keeping as distinguished from the leasing to the owner of the vehicle of a separate compartment where the vehicle may be kept by the owner, without any custody thereof by the lessor of the premises or responsibility on his part for the safe-keeping of the vehicle.

We are, therefore, of the opinion that the building in question should be classed as a garage within the meaning of that term as defined in the ordinance, and the keeper thereof should be required to secure a license.

Yours respectfully,

FRANK W. DERBY,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Benefits Under Municipal Employee's Annuity and Benefit Fund Act.

September 18, 1922.

THE RETIREMENT BOARD OF THE MUNICIPAL EMPLOYEES ANNUITY & BENEFIT FUND, Chicago, Illinois.

Gentlemen:

We are in receipt of your communication of September 8, in which you state that Mr. John J. Brennan, head clerk of the Board of Education Audit Division, filed an application for ordinary disability benefits to date from June 19, 1922, and that at the meeting of the retirement board held on August 22, 1922, his application was approved at the rate of \$3.38 per day, which sum was arrived at on the basis that Brennan's salary was \$225 per month. In your communication you state that you have been advised by the Board of Education and also by Mr. Brennan that the Board of Education passed its budget for the year of 1922 on August 9, 1922,

and in said budget fixed the salary of Brennan at the rate of \$2,820 per annum, effective as of January 13, 1922, and that Mr. Brennan claims that he is entitled to ordinary disability benefits on the basis of his salary as fixed in the budget of the Board of Education for the year of 1922.

In reply, we beg leave to advise you that salaries as fixed in the annual budgets of municipal corporations are held to be retroactive, that is, to date back to the beginning of the fiscal year. We have made this ruling in regard to salaries fixed in the annual appropriation bill passed by the City Council, and it is our opinion that the same rule should apply to the Board of Education.

Section 47 of the act creating a municipal employees' annuity and benefit fund in the City of Chicago provides that before any payment of ordinary disability benefits shall be made to any municipal employe, an amount equal to the sum or sums ordinarily deducted from the salary of such municipal employe, for all annuity purposes during a period of time equal to that for which such payment of ordinary disability benefit is to be made shall be deducted from such payment and credited to such municipal employe as a deduction from his salary for such period, and that such sums so deducted and credited shall be regarded for annuity and refund purposes as sums deducted from the salary of such municipal employe.

It is our opinion that in the case of Brennan, as in all other similar cases, the deduction should be based upon the salary as fixed in the current annual budget.

It is, therefore, our opinion that Mr. Brennan is correct in his contention that he should receive ordinary disability benefits on the basis of a salary of \$2,820 per annum.

Yours truly,

JAMES W. BREEN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Compensation to City from Chicago Telephone Co.

September 20, 1922.

HON. GEORGE F. HARDING, Comptroller.

Dear Sir:

Replying to your request for an opinion as to whether the Chicago Telephone Company should be required to pay compensation on the amount received from the U. S. Government under its guarantee for the period of government operation of the telephone plant, we respectfully submit the following:

Section 3 of the telephone ordinance, passed by the City Council November 6, 1907, and accepted by the company December 2, 1907, reads as follows:

“COMPENSATION—GROSS RECEIPTS—LOCAL BUSINESS.)
Section 3. The said Chicago Telephone Company shall file with the comptroller of the city within sixty (60) days after the first day of January and of July in each and every year a statement in such form and detail as shall from time to time be prescribed by said comptroller of all its gross receipts from *all the business done by said company within the City of Chicago* for the six (6) months next preceding said first day of January and of July, which statement shall be sworn to by the president and secretary of said company, and at the time of filing said statement the company shall pay into the city treasury three per cent (3%) on all such gross receipts. All moneys received by said Chicago Telephone Company for service, communication and messages from the exchanges, offices, stations or telephones of the said company or of its lessees, subscribers or patrons, located within the City of Chicago to any exchanges, offices, stations or telephones now or hereafter owned, operated or leased by or to said company outside of the City of Chicago (commonly known and designated as ‘toll’ service, communication or messages), together with *all moneys received by said Chicago Telephone Company*, as its share of the gross receipts for service, communication and messages between the exchanges, offices, stations or telephones of the said company, *or of its lessees*, subscribers or patrons located within the City of Chicago and any exchanges, offices, stations or telephones of any other company or persons outside said City of

Chicago (commonly known and designated as 'long distance' service, communication or messages), shall, for all the purposes of this ordinance, and particularly for the purpose of computing the compensation semi-annually due the City of Chicago hereunder, be deemed and treated as a part of the gross receipts from the business done by said Chicago Telephone Company within the City of Chicago."

It will be noted that by this section the company obligated itself to pay, as compensation to the city, 3 per cent on the "gross receipts from all business done by said company within the City of Chicago," whether its telephones and stations were operated by the company itself "or its lessees."

In our opinion, the expression "business done by said company" is broad enough to include the business of letting its plant to the U. S. Government for a specified rent or other remuneration. But whether this be so or not, the U. S. Government certainly occupied the position of a "lessee" of the company, with respect to this particular property, during the time it was using and operating the same and paying the company therefor.

The word "lease" has a very broad meaning in law, and any permissive holding, by one person, of the property of another for a definite period, accompanied by the payment of rent or compensation therefor, constitutes in law a *lease*, and the person so holding the property is called a *lessee*, whether the terms "lease" and "lessee" are in fact used or not.

In *West Chicago St. R. R. Co. v. Morrison Co.*, 160 Ill. 288, the court said

"The court will look at the substance of the agreement that was made and the evident intention of the parties, and if what was agreed upon was in fact a leasing or renting, * * * it is immaterial that the word 'lease' was not used in respect thereto."

In Bouvier's Law Dictionary, Vol. II, p. 154, we read:

"Leases are made either by parol or by deed. * * * No particular form of expression is required in any case

to create an immediate demise. * * * *Any permissive holding* is, in fact, sufficient for the purpose.”

Citing *Barrington v. Casey*, 78 Ill. 317.

In Pope’s Legal Definitions, p. 867, we read:

“The term ‘lease’ is used in strict law so as to include any demise for any period, however short or however long, and the conventional distinction sometimes made between a ‘tenancy’ and a ‘lease’ is not to be admitted in construing statutes.”

The law under which the U. S. Government took over the telephone system was the act of July 16, 1918 (Chap. 150, 46 U. S. Stat.; Barnes Fed. Code, Sec. 10170), which read as follows:

“§ 10170. Federal control of telegraphs and telephones.—The president during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the president of the exchange of ratifications of the treaty of peace; provided, That just compensation shall be made for such supervision, possession, control, or operation, to be determined by the president; and if the amount thereof, so determined by the president, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the president and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code: *Provided, further, That nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of*

stocks and bonds by such system or systems. (Res. July 16, 1918, No. 38, c. 154, 40 Stat.)”

We are unable to find any word or expression, either in the Ordinance of 1907 or in the U. S. Statute of 1918, which would relieve the telephone company from its obligation to pay compensation to the city for the period of time that its telephone system was operated by the U. S. Government. Nor is there any equitable reason why it should not pay, for the company itself has been paid by the U. S. Government. Whether it has received as much as it considered itself entitled to, is a question between it and the U. S. Government, with which the City of Chicago has no concern.

We are of the opinion, therefore, that the Chicago Telephone Company (or, as we believe it now calls itself, the Illinois Bell Telephone Company), is liable to pay to the City of Chicago 3 per cent of the \$1,875,669.93 received from the U. S. Government during the period of government operation of the telephone system.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Status of Corporation Counsel with Reference to Board of Local Improvements.

September 29, 1922.

HON. WILLIAM HALE THOMPSON, Mayor of the City of Chicago.

Dear Sir:

I am in receipt of a communication, under date of September 27, 1922, from the president of the Board of Local Improvements, together with a copy of a communication forwarded to you, advising me that the following resolution was on said date passed by the Board of Local Improvements, which said resolution reads as follows:

“BE IT RESOLVED, That the appointment of Samuel A. Ettelson, Corporation Counsel, as attorney for the Board of Local Improvements, heretofore made by this board, be and it is hereby revoked and rescinded; be it further

“RESOLVED, That George A. Curran be and he is hereby appointed as attorney for the Board of Local Improvements for the City of Chicago with full power to have charge, under the direction and control of the board, of all legal matters pertaining to the Board of Local Improvements, the confirmation of special assessments and the collection of same.”

This communication and this resolution are in accordance with the attitude assumed by the president of the Board of Local Improvements, and disclose his apparent determination to insist that all legal matters and proceedings pertaining to the work of the Board of Local Improvements, are entirely outside of the jurisdiction of the corporation counsel and within the exclusive control and direction of the board. I was in hopes that a careful investigation on the part of the president of the board would result in his adopting the same attitude that all other executive heads of municipal departments have consistently followed, and which his predecessors have heretofore at all times acknowledged and conceded. I deeply regret the necessity that is now forced upon me of addressing your Honor in regard to this matter, but the transmission by the president of the Board of Local Improvements to your Honor of the letter above referred to and the action of the board in adopting the resolution in question make it imperative for me immediately to communicate to you my opinion as to the legal status of the corporation counsel as the head of the Law Department of the City of Chicago.

Section 7 of Part Two of Article XII of the Cities, Villages and Towns Act, approved May 18, 1905, in force July 1, 1905, commonly referred to as the “Little Charter of Chicago,” page 354, Hurd’s Revised Statutes of 1921, which was submitted to and approved by a majority of the legal voters of the City of Chicago and incorporated as a part of the city charter of Chicago, reads as follows:

“The *head of the Law Department* of the city shall be the corporation counsel, and the duties heretofore performed by the city attorney shall be performed by the corporation counsel and his assistants. From and after the adoption of this act the office of city attorney shall be abolished.”

The office of corporation counsel has been in existence for over fifty years.

Pursuant to the power conferred upon the City Council by the “Little Charter” adopted in 1905 the Council, on March 13, 1911, adopted the following ordinance, which is printed on page 25 of The Chicago Code of 1911:

“85. DEPARTMENT ESTABLISHED.) There is hereby established an executive department of the municipal government of the city which shall be known as the Department of Law and which shall embrace the corporation counsel and such number of assistants and clerks as the City Council may by ordinance provide; one of such assistants shall be known as the city attorney and another as the prosecuting attorney.

“86. OFFICE CREATED.) There is hereby created the office of corporation counsel. He shall be appointed by the mayor by and with the advice and consent of the City Council and shall be the *head of the Law Department of the city*.

“87. BOND.) Said corporation counsel before entering upon the duties of his office shall execute a bond to the city in the sum of five thousand dollars, with such sureties as the City Council shall approve, conditioned for the faithful performance of the duties of his office.

“88. ASSISTANTS—APPOINTMENT AND REMOVAL.) The corporation counsel shall have the power of appointing and removing all or any of his assistants and clerks.

“89. DUTIES.) He shall superintend and with the assistance of the city attorney and prosecuting attorney conduct *all the law business of the city*.”

The City Council clearly had the power to thus define the duties of the corporation counsel under and by virtue of Sections 2 and 3 of Article VI of the Cities, Villages and Towns Act, Section 2 of which provides in part:

“The City Council may, in its discretion, from time to time, by ordinance passed by a vote of two-thirds of

all the aldermen elected, provide for the election by the legal voters of the city, or the appointment by the mayor, with the approval of the City Council, of a city collector, a city marshal, a city superintendent of streets, a *corporation counsel*, a city comptroller, or any or either of them, and such other officers as may by said Council be deemed necessary or expedient."

Section 3 provides, in part:

"The City Council may, by ordinance not inconsistent with the provisions of this act, *prescribe the duties* and *define the powers* of all such officers, together with the term of any such office. * * *"

The "Law Department" of a municipal corporation has a fixed and well defined meaning under the law, and when the Legislature of the state in 1905 made the corporation counsel of Chicago the "head of the Law Department," under a well-known rule of construction it used the term "Law Department" in its well understood meaning. The Law Department of a city necessarily looks after and transacts all the legal business of the city. That is its proper function and purpose, and all judicial authorities in all jurisdictions are in accord on the proposition that where the scheme of municipal government provides a corporation counsel or city attorney or other legal officer for the municipality whose duty it is to appear on behalf of the municipality in all suits by or against the corporation, and to conduct *all the law business* of the corporation, the municipality is *deprived* of its power to employ another attorney to take the place of and perform the duties which naturally belong to its law officer.

Dillon on Municipal Corporations, 5th Ed., Sec. 824, pages 1244 and 1245.

Indeed, this rule of law is so well recognized and so rigidly applied that the courts have not hesitated in setting aside entire legal proceedings, because the municipality or some department thereof had instituted such proceedings through attorneys other than the recognized head of the city's law department.

For instance, in the case of *In re Lorillard et al.*, 13 New York Supplement, page 83, the Supreme Court of New

York set aside proceedings instituted by a certain board of commissioners in the City of New York to acquire certain lands for municipal purposes, solely because of the fact that such proceedings were not conducted by the corporation counsel of the city. In that case the court said in the course of its opinion:

“But while the commissioners in charge of the work of providing the Washington bridge were authorized by Section 2 of Chapter 249 of the Laws of 1890 to apply for the appointment of three disinterested persons as commissioners of appraisal, the manner in which that application could regularly be made was not prescribed nor defined by it. The power alone was given to them by this act, without indicating in any manner the practice to be followed in its enforcement. That, therefore, may be properly ascertained by consulting so much of Chapter 410 of the Laws of 1882 as has provided for the transaction of the legal business of the city. This was business of that description, for the land to be obtained was for the city, and to be paid for by it. When obtained, the title to it was to be vested in the city, and held in trust by it for the benefit of the public. By Section 215 of this act the Law Department of the city has been given ‘the charge and conduct of all law business of the corporation and its departments, and of all law business in which the City of New York shall be interested,’ except as otherwise might be provided. There was no provision of law excepting this proceeding from this very general provision and it should be so construed as to include it in fact, as it does in its terms. This was not merely a formal enactment, for the interest of the city, and the avoidance of confusion, and the prevention of abuses were intended to be secured by it. If commissioners in one case could withdraw the conduct of their legal proceedings from the Law Department, there would be nothing to prevent the same from being done in all other instances, and endless confusion would be the result. The power has also been specially deputed to that department to guard the interests of the city. It is expected to act justly and impartially, and that it will avoid all extraneous influences which might affect an individual not subject to the same responsibilities. Its duty is to see to it that the city shall not be obliged to pay more than a fair equivalent for what it is to obtain, and at the same time to avoid injustice to the party whose

property may be acquired; and there is great and manifest fitness in confiding the control of all these proceedings to that department of the city government. The objection that this proceeding was not instituted and carried on before the court by the corporation counsel is not formal *but substantial*. It vitally affects the rights of the city whose inhabitants, by way of taxation, must finally pay the price awarded for the property. And the omission of the counsel, if it was in fact omitted, to present this objection when the application was heard was no waiver of it. His duty was not to waive or surrender it, *but to insist upon its observance*. But if he failed from inadvertence to make the objection, the public interests can not be permitted to suffer on account of that fact. *For the law is mandatory that the Law Department shall have the charge of the legal business of the city*, and it is equally the duty of this court to observe and maintain that mandate. That can be not otherwise now done than by vacating this order, and requiring the commissioners to make their application and conduct their proceedings to obtain the title to this land through the intervention of the *Law Department of the city*."

It will be observed that the provisions of the statute of Illinois and the ordinances of the City of Chicago passed pursuant thereto, defining the duties and authority of the corporation counsel of Chicago, are as broad as, if not broader than, the provisions of the New York City Consolidation Act referred to in the foregoing opinion of the Supreme Court of New York. When the Legislature of the State of Illinois in 1905 made the corporation counsel "the head of the Law Department of the city" it necessarily meant the corporation counsel with his powers and duties as defined by ordinance of the city under legislative sanction and authority, and with the powers and duties of attending to all legal matters of the city as recognized by all courts in all jurisdictions.

Wherever the question has arisen in legal proceedings the courts without exception have held that where there is a recognized law department in a municipality, the city or any of its departments or boards or committees is wholly without authority to employ an attorney outside of such law department to attend to any legal matters in its behalf.

In our own state, in the case of *Hope v. City of Alton*, 214 Ill. 102, where the question arose as to whether the plaintiff could recover from the City of Alton for legal services performed by him in behalf of said city under a special contract with the city, the Supreme Court, in holding that there could be no recovery for such services, laid down the rule that where the city had by ordinance created a law department with a corporation counsel at its head, charged with the duty of conducting the legal affairs of the city, the city had no authority to employ outside counsel to attend to any of its legal matters.

Along the same line, and following the same reasoning is the case of *Fergus v. Russell*, 270 Ill., page 304, in which the Supreme Court at page 335, in discussing the powers and functions of the attorney general of the state, lays down the rule that, inasmuch as the attorney general is the head of the law department of the state, all legal matters affecting the state or any of its departments are exclusively within the duties of his office and that neither the state nor any of its departmental agencies has the authority to employ outside counsel.

It may here be noted that as in that case our Supreme Court said that when the office of attorney general was created in this state there attached to the office all of the powers and duties of an attorney general as known to the common law, so in this case when the act of 1905 made the corporation counsel, "the head of the Law Department of the city" the General Assembly advisedly used the terms "corporation counsel" and "head of the Law Department of the city" in their well established meaning. Other cases that may be cited in corroboration of the well established rule that all legal matters of the city or any of its departments or agencies are under the exclusive authority and direction of the corporation counsel as head of the Law Department, are as follows:

Rafael v. Boyle, 31 Cal. App. 623, in which the court on pages 623 to 626 said:

"The sole question presented for determination is whether or not under these facts the Civil Service Commission has the power to retain an attorney at the ex-

pense of the city when the city attorney was ready and willing to perform the necessary legal services. It is contended by the respondent that under the broad provisions of Article XIII of the charter of the city and county of San Francisco, the right to retain counsel other than the city attorney is incidental to the very nature and life of the civil service system as therein created. * * * It is usual, however, to find in municipal charters or laws applicable to the government of local public corporations, provisions dealing with the conduct of the municipality's legal business. Such is the case in the charter of San Francisco, which provides for a legal department, the head of which is known as the city attorney, and whose duties are set forth in Article V, Chapter 2, as follows: 'He must prosecute and defend for the city and county all actions at law or in equity, and all special proceedings for or against the city and county; and whenever any cause of action at law or in equity or by special proceedings exist in favor of the city and county he shall commence the same when within his knowledge, and, if not within his knowledge, when directed to do so by resolution of the board of supervisors. He shall give legal advice in writing to all officers, boards, and commissions named in this charter, when requested so to do by them, or either of them in writing, upon questions arising in their separate departments involving the rights or liabilities of the city and county. He shall not settle or dismiss any litigation for or against the city and county under his control unless upon his written recommendation he is ordered to do so by the mayor and supervisor.'

"This express provision clearly indicates an intention that the city attorney should handle all the legal work of the various departments of the city government, except where special provision is made for additional counsel. The manifest intention of the framers of the charter in the adoption of this provision was to systematize the conduct of the city's legal business, and to limit the power of the authorities to incur expenditures for this character of service; and the mere power given the commission to institute and prosecute legal proceedings does not imply that this above-quoted provision of the charter should be inoperative with regard to the Civil Service Commission so as to empower it to employ another attorney to perform the duties belonging to the law officer of the municipality. The charter having pro-

vided a city attorney upon whom the board can call when a defense to any suit is necessary, it by implication makes it incumbent upon the board to avail itself of his services, and it can not ignore this provision and employ some other attorney to render those services which it is the duty of the city attorney to perform. *Denman v. Webster*, 139 Cal. 452; *Merriam v. Barnum*, 116 Cal. 619."

In *Collins et al. v. Board of Street Commissioners*, 70 Hun. 583 (N. Y.), it was held that where authority was vested in the trustees of the Village of Saratoga Springs to employ an attorney for the village such power was exclusive, and no other village board or official has power to employ other attorneys, and no attorney except the one thus regularly employed could represent the village or any board or officer thereof.

In *Valentine Clark Co. v. Allegheny City*, 143 Fed. 644, it was held that the city solicitor was the duly appointed representative of the municipality in legal affairs and that "it would result in great confusion if other officials could intervene and interfere as they saw fit in the conduct of a case committed to his care."

In *State v. Sinking Fund Commissioners*, 10 N. J. L. 219, the Supreme Court of New Jersey held that a sinking fund commission was not an independent municipal corporation, but a department of the city government; and with respect to the power of the commission to employ counsel outside of the department of law of the city, the court said. on page 220:

"That section of the city charter providing for the appointment of a city counsel strengthens the above opinion. The charter provides for the appointment of city officers and provides for a complete system. Among them it includes a city counsel, and defines his duties. The duties of the city counsel are to do the general law business of the city and to advise all city officials and departments as to law matters, and the law also fixes his salary, and says that he shall receive no fees of any kind for his work. If the commissioners required legal advice it was the duty of the city counsel to give it and be responsible for it."

In *Rawson v. The Mayor*, 4 Abb. PR. (New York Supreme Court) 342, the Board of Aldermen of the City of New York resolved to institute an investigation into the affairs of the Police Department, and appointed a committee to conduct the investigation. Several witnesses declined to answer questions, and the committee instituted proceedings to compel them to answer. The counsel for the corporation was not employed or appointed to conduct these proceedings; but the special committee employed such counsel as were agreeable to them for that purpose. The question involved was whether the city was liable for the fees of these counsel. In holding that the city was not liable the court said at pages 343 to 345:

“No question is made in this cause as to the rendition of the services of the plaintiff’s assignor, or the reasonableness of the charges therefor. The simple question presented is, can the corporation be made liable for this claim?

“Section 18 of the charter of 1849, organized an executive department, to be known as the ‘Law Department,’ which shall have charge of and conduct all the law business of the corporation and of the departments thereof, and all other law business in which the city shall be interested, when so ordered by the corporation.

“By the city charter, therefore, the counsel to the corporation is ‘to have charge of and conduct,’ not only all the law business of the corporation, but all the law business of the several departments of the corporation. These provisions apply to all cases in which the corporation or any of its departments have any law business to be transacted. In addition to this, the counsel is also to have charge of and conduct ‘all other law business in which the city shall be interested, when so ordered by the corporation.’ The application of this latter provisions and the reasons for its enactment, are familiar with (to) all who have had any practical knowledge of the affairs of the city government. Many suits, proceedings, and cases are constantly instituted, in which neither the corporation nor any of the departments are parties. But the question to be decided may be such as to affect the property or right of the corporation or some of its officers. Previous to the charter of 1849, such suits were defended or prosecuted by counsel employed by the

immediate party to the action, and frequent calls were made upon the city treasury for their payment, on the ground that the corporation was interested in the suit or in its result. The intent of the charter of 1849 was to place all legal business in the control and under the management of the corporation counsel, in the result of which the corporation might have any interest, and for the expense of which it might by any possibility be called on for payment. It was in reference to this class of cases that the counsel to the corporation was to take charge of and conduct, whenever required so to do by the corporation, all law business in which it had any interest. It is quite manifest that it was the intention of the provisions of the charter and the ordinances that all the law business of the corporation, or of its departments, or in which the corporation should deem it had any interest, to be conducted by and placed in the charge of the counsel to the corporation. For these services a specific salary is given to that officer—such as was deemed an adequate and reasonable compensation therefor. These services he is bound to render, and must do so for the compensation allowed. It is in the power of the Common Council to alter and graduate this compensation from time to time in reference to the services rendered; but I can find no authority for it to withdraw and place in other hands duties which the charter has confined to him, and which he, by his oath of office and every obligation resting upon a public officer is bound to discharge.

“The counsel is not only required to take charge of and conduct all the law business of the corporation, but all the law business of the several departments thereof. The powers of the corporation of this city are divided into legislative and executive. The legislative powers are vested in a Board of Aldermen and Board of Councilmen, who, together, form the Common Council of this city. These two bodies, therefore, form the legislative department of the city government, and are as much subject to the provisions of the charter as the executive department. The powers of the latter are vested in the mayor and the heads of the several departments created by that charter, and each moves in its allotted sphere, subject to the restraints of their common constitutional superior, the charter of the city. It is, therefore, quite apparent that the counsel to the corporation has confided to him and it is made his duty to conduct, as well all the law business of the legislative department of the corpora-

tion, or either branch of it, as to conduct the law business of the several executive departments, and their several branches and subdivisions; and it is not easy to see how it is competent for the legislative department, or any of its committees or agents, to pass by the law officer selected by the people, and charged by the charter with these duties, and select and appoint other counsel. If it can be done, it may be equally competent for each of the executive departments and their several subordinates to do the same thing.

"This certainly would present an anomalous state of affairs. Each department might thus have its own law officer, subjecting the city treasury to enormous drains, while the legally and duly selected law officer of the city, to whom is given a salary for the discharge of these duties, who has an office and clerks provided for at the public expense, to enable him the more readily to discharge them, may be sitting idly in his office, and receiving this compensation without rendering any equivalent. I am quite sure that no such state of things can be allowed under the charter, or that there can be any serious doubts that it can not be permitted.

"If the duties of the counsel prescribed by the charter can be taken away from him and confided to others by the Common Council, or either board, or by any committee thereof, why may not the same thing be done to those of the mayor, comptroller, or any head of any other department? The simple statement of the proposition carries with it its refutation. If it, however, can be done in the one case it certainly can in the other. Section 19 of the charter of 1849 authorize the Common Council to establish such other departments and bureaus as they may deem the public may require, and to assign to them and those officers therein created such duties as they may direct, *not inconsistent with this act*.

"This provision is a clear legislative restriction on the power of the Common Council to withdraw any duties confided by the charter to any particular department or bureau, and devolve the same upon any other department or bureau then existing or thereafter to be created.

"So long as these plain and unmistakable provisions of the charter continue in force, I can have no doubt that they must be conformed to."

The president of the Board of Local Improvements seeks

to justify his attitude in refusing to recognize the right and duty of the corporation counsel as head of the Law Department to advise the Board of Local Improvements upon its legal matters and to conduct litigation respecting local improvements in the city, under the claim that Section 83 of the Local Improvements Act of the State of Illinois vests in the Board of Local Improvements the authority to appoint its own attorney who shall have charge, under its direction and control, of all legal matters pertaining to the Board of Local Improvements, the confirmation of special assessments and the collection of the same. This section, upon which the president of the Board of Local Improvements thus relies, was passed by the Legislature in 1901, *four years prior to the act of the Legislature making the corporation counsel the head of the Law Department of the city*, and he evidently has overlooked the fact that said Section 83, Article IX, in so far as it confers upon the Board of Local Improvements the power to appoint its own attorney and assistant attorneys, has been superseded by Section 7, Part Two, Article XII, making the corporation counsel the head of the Law Department of the City of Chicago.

It is manifest that the Law Department of the city is charged with the duty of attending to all the legal affairs, not only of the city as a whole, but of all its departments and agencies, and that the provisions of said Section 7, Part Two, Article XII, making the corporation counsel the head of the Law Department of the City of Chicago, are necessarily inconsistent with the provisions of said Section 83, Article IX, conferring upon the Board of Local Improvements authority to appoint its own attorney and assistants. This being the case, the above provision of said Section 83, relating to the appointment of the attorneys of the Board of Local Improvements, are superseded by said Section 7, and such provisions are no longer applicable to the City of Chicago.

As head of the Law Department of the city, the corporation counsel has direct authority and control over the legal matters of every department and agency employed by the city in the conduct and operation of municipal affairs, and when

the Legislature in 1905 made the corporation counsel "head of the Law Department of the city," it thereby rendered inoperative, as applied to the City of Chicago, that part of Section 83 of the Local Improvements Act authorizing the board to appoint its own attorney and assistant attorneys. If it had been the intention of the Legislature in the Act of 1905 to permit the Board of Local Improvements to have its own independent legal staff and thus encroach upon the functions of the Law Department of the city, the Legislature would so have provided in the act by excepting the Board of Local Improvements from its operation.

It is clear that said Section 83, Article IX, Chapter 24 (the Local Improvements Act), passed in 1901, in so far as it applies to the appointment of an attorney and assistant attorneys, and Section 7, Part Two, Article XII, Chapter 24 (known as The Little Charter of Chicago), passed in 1905, are inconsistent. If it were to be held that the Board of Local Improvements is entitled to create its own "Law Department," the Law Department of the city, would to that extent be deprived of its powers and duties regarding municipal legal matters, and its functions circumscribed and limited to only a portion of the city's legal affairs, and to that extent said Section 83 would be in direct conflict with said Section 7.

While the Act of 1905 as contained in said Article XII, Chapter 24, expressly provides that any provision of any other section or part of the act that is inconsistent with any provision contained in said Article XII shall be superseded by the provision in Article XII so far as the City of Chicago is concerned, and it is not necessary for the Law Department of the city to invoke the familiar doctrine of "repeal by implication," nevertheless the books are full of authorities holding that where a later statute deals differently with the same subject-matter than a prior statute, the later statute, by implication, repeals and supersedes the former statute. In making the corporation counsel head of the Law Department of the City of Chicago with his jurisdiction extending over "all the law business of the city" (which necessarily includes

every part as well as the whole), there can be no question but that the Legislature has dealt with the same subject matter as that contained in said Section 83 of the Local Improvements Act pertaining to employment of attorneys by the board.

It would serve no useful purpose unduly to extend this communication by quoting at length from the various decisions of our courts of review in this state holding that in cases such as the present one the former statute is repealed by implication by the later statute, but, for the purpose of presenting the established rule the following excerpts from a few decisions are presented.

In *New York Central R. R. Co. v. Stevenson*, 277 Ill. 474, at page 481, the rule is stated as follows:

“Where the effect of the later act is not to entirely abrogate a former one, but merely to withdraw from the operation of the former act *a portion of the cases included within its terms*, leaving it in force as to cases not provided for by the later law, the result will be that the earlier act *will be in part* superseded by the effect of the provision of the later act. (Citing *People v. Sweitzer*, 266 Ill. 459.)”

Again in *Dutton v. City of Aurora et al.*, 114 Ill. 138, at page 144, it is said:

“The propositions are so fundamental and familiar that it is not deemed necessary to cite authorities to prove * * * that where the provisions of a former and a later statute are inconsistent and repugnant in respect of the same subject-matter, the latter is a repeal of the former *to the extent of the inconsistency or repugnancy*.”

In the case of *Wilson v. O. & M. Ry. Co.*, 64 Ill. 542, Judge McAllister tersely states the rule as follows:

“It is a familiar rule that every statute is, by implication, a repeal of all prior statutes, *so far as it is contrary and repugnant thereto*, and that without any repealing clause.”

In the case of *Price v. The Board of Local Improvements*, 187 Ill. App. 629, the question before the court was whether that part of Section 83 making the Board of Local Improvements final arbiter upon the question of the fulfillment of the

contract, was repealed by Section 84 of such act as amended in 1903. The court in holding that said Section 84 as amended was not in harmony with said provision of said Section 83, and that therefore, said provision was repealed by implication, stated the rule in the following words:

“As this section is *not in harmony* with Section 83 (J. & A., par. 1476), we must hold that Section 84 as amended repeals so much of Section 83 as is in conflict with the new Section 84.”

That an entire act or section is not repealed by implication, but only such part or portion thereof as is inconsistent with the later statute, is again very clearly stated by our Supreme Court in the case of *The People v. Sweitzer*, 266 Ill. 459, at page 476. In holding that the provision of Section 3 of Chapter 131 of Hurd's Statutes that “no act or part of an act repealed by the General Assembly shall be deemed to be revived by the repeal of the repealing act,” had no application in the case, the court said:

“That provision has no application where the effect of an act is *not to entirely abrogate a former act*, but merely to withdraw from the operation of the earlier act *a portion* of the cases included within its terms, leaving the earlier act *still in force* except as to the cases specifically provided by the later one.”

So rigidly is this rule of “repeal by implication” applied by the courts that it is even held that parts of a *general act* of the Legislature will be repealed by a subsequent *special act* when the two, as to such part or parts, can not be harmonized. For instance, in the case of *Lang v. Freisenecker*, 213 Ill. 598, at page 608, the court said:

“It is also held by the authorities that a ‘*general act* will be repealed *pro tanto* by a subsequent *special act* when the two acts can not stand together.’ ” (Citing 26 Am. & Eng. Ency. of Law, 2d Ed., p. 743.)

In *McCormick v. The People*, 139 Ill. 499, it was held that a general act of the Legislature providing for the election of president of a village repealed by implication the provision of a special charter requiring the president to be elected by the Board of Trustees of the village.

Again in the *State Public Utilities Commission v. C. C. C. & St. L. Ry. Co.*, 283 Ill. 374, at page 378, the rule is stated as follows:

“The law is, that if two statutes deal with the same subject-matter and are inconsistent with each other, so that both can not be operative as to such subject-matter, the later act will be regarded as a substitute for the former one and will operate as a repeal although it contains no express repealing clause.”

Many other adjudicated cases could be quoted illustrating the scope and application of this doctrine of repeal by implication as above stated. But the rule is so well settled that we do not deem it necessary to make any further quotations from legal authorities along this line.

The president of the Board of Local Improvements cites the case of *City of Chicago v. Lord*, 277 Ill. 397, as holding that special assessment suits ordered by the City Council, upon the recommendation of the Board of Local Improvements, need not be filed by the corporation counsel but may be filed by some other attorney, appointed by the board. In our opinion, that is exactly what the Supreme Court refused to hold in that case. The City Council had, in that case, ordered the special assessment petition to be filed by “the attorney for the Board of Local Improvements,” and it was filed by the corporation counsel signing the petition as “Attorney for the Board of Local Improvements.” Subsequently some interested property owners sought to have the petition thrown out of court, and the whole proceeding annulled, on the ground that since Section 13 of the Local Improvements Act requires all such petitions to be filed by “an officer of the city,” and since “the attorney for the Board of Local Improvements” was not an officer of the city but a mere employe of the board, that provision of the statute had not been complied with. But the Supreme Court sustained the petition, on the ground that “the attorney for the Board of Local Improvements” also happened to be the corporation counsel, and as such was “an officer of the city.” The Supreme Court plainly left it to be inferred, therefore, that had the petition

been filed by some other attorney than the corporation counsel, it would not have been valid.

That the Board of Local Improvements, as well as the City Council, have always understood the Lord case to hold what we have above stated, is amply proved by the fact that in all special assessment proceedings instituted since the date of the decision in the Lord case, the Board of Local Improvements have recommended, and the City Council have ordered, that the special assessment petition be filed by "the corporation counsel," instead of, as in the Lord case, by "the attorney for the Board of Local Improvements."

The question as to the right of the Board of Local Improvements to appoint some other attorney for the board than the corporation counsel, did not arise in the Lord case, for the simple reason that the board had never attempted to appoint anybody else, and therefore neither the attorneys nor the court had any occasion to discuss that question, nor did they in fact do so. The Lord case has heretofore no bearing whatever on that point.

In all these proceedings the *city*, and not the Board of Local Improvements, is the plaintiff, and it necessarily follows that the corporation counsel, *as head of the Law Department of the city*, is the only *proper attorney* to appear in behalf of the city as said plaintiff, and every ordinance passed by the City Council, providing for the filing of a petition for local improvements, contains the following section:

"That the *corporation counsel* be and is hereby directed to file a petition in the Circuit, Superior or County Court of Cook County, *in the name of the City of Chicago*, praying that steps may be taken to levy a special assessment for said improvement in accordance with the provisions of this ordinance and in the manner prescribed by law."

This practice on the part of the City Council in incorporating in its ordinances the requirement that the proceedings shall be prosecuted by the corporation counsel, has been followed in all cases since the decision in the above case of the *City of Chicago v. Lord*, in clear recognition of the effect of that decision that the petition should be filed by the cor-

poration counsel as an officer of the city. Indeed, in the very litigation that is now pending for the widening and improvement of South Water street, Ashland avenue, and all other pending litigation for similar improvements, the ordinances of the city authorizing the institution of such proceedings for the making of such improvements contain the very provision above quoted, and the corporation counsel, in compliance with such ordinance, has filed the petition in all those proceedings.

The president of the Board of Local Improvements, in his communication to your honor, has stated that prior to the decision of the Lord case the board had the corporation counsel file the petitions in all cases and attend to such litigation, because of doubts expressed in the trial courts as to the authority of any other attorney so to do, but says that since the decision of the Lord case that doubt has been removed, and that the board *now feels* that it may appoint an attorney to attend to such legal matters.

The Lord case was decided in February, 1917, and since that decision the Board of Local Improvements has recognized the necessity of the corporation counsel filing the petitions and conducting the various litigation for local improvements, until very recently. An additional corroboration of the view of the City Council as to the necessity of having litigation for the making of public improvements, conducted in the name and under the direction of the corporation counsel, as head of the Law Department of the city, as well as all other litigation in behalf of the city, is found in the *Annual Appropriation Ordinance* passed by the City Council of Chicago appropriating funds to the Department of Law for the purpose of conducting the law business of the city.

A reference to the Annual Appropriation Ordinance for the year 1922, passed February 10, 1922, and appearing on pages 1899 and 1900 of the Journal of the Proceedings of the City Council of said date, will disclose the following items provided by said Appropriation Ordinance for the office of the Department of Law, to be expended exclusively under the direction of the corporation counsel:

“Assistant corporation counsel and attorney for Civil Service Commission	\$4,000.00
“Assistant corporation counsel and attorney for Fire Department	3,300.00
“Assistant corporation counsel and attorney for Water Department	2,500.00
“Assistant corporation counsel (\$4,000.00 of this amount to be reimbursed from Street Improvement Bond Funds), Board of Local Improvements	7,500.00
“Assistant corporation counsel and attorney, Board of Local Improvements.....	6,000.00
“Assistant corporation counsel and attorney, Board of Local Improvements.....	5,000.00
“Assistant corporation counsel and attorney, Board of Local Improvements.....	4,000.00
“Assistant corporation counsel and attorney, Board of Local Improvements, 2 at \$3,000.00	6,000.00
“Assistant corporation counsel and attorney, Board of Local Improvements.....	2,000.00”

It is thus seen that the City Council of Chicago clearly recognizes, and has long recognized the fact that there is but one “Law Department” in the City of Chicago, and *that* is the Law Department of which the corporation counsel is the *head*, as provided by the act of 1905; and in line with such recognition, the City Council has not only incorporated in all of its ordinances for local improvements *the direction* that the *corporation counsel* shall file the petitions and conduct the litigation therein, but has also, each year, by its Annual Appropriation Ordinance, provided for the legal expenses to be incurred in conducting such litigation, and has never, at any time, in such appropriation ordinances, made or attempted to make any provision for any funds to be paid to any attorney for the Board of Local Improvements, except in the Annual Appropriation Ordinance for the office of corporation counsel.

There is no item in the Appropriation Ordinance for the year 1922, which can be made available to pay any attorney for the Board of Local Improvements unless such attorney is “an assistant corporation counsel.” Consequently, any per-

son whom the Board of Local Improvements may attempt to appoint as its own attorney must be and continue to be "an assistant corporation counsel" in order to draw any pay.

CONCLUSION.

In view of the provisions of the Statute of the State of Illinois and the ordinances above quoted in this opinion, it is my opinion that the adoption of the "Little Charter" in 1905 *superseded* that portion of Section 83 of the Local Improvements Act authorizing the board to appoint an attorney and assistant attorneys, and that all legal matters pertaining to said board, were by said act, placed exclusively within the control and direction of the corporation counsel, *as head of the Law Department of the City of Chicago*.

I further desire to advise your honor that it is my opinion that, if any petition is filed in any court of record for the purpose of levying a special assessment for any local improvement by any attorney other than the corporation counsel, there is grave danger that the courts will, either upon objection raised by counsel, or upon their own motion, vacate and set aside the entire proceedings, as was done by the Supreme Court of New York in the Lorillard case herein-above quoted.

Yours very truly,
SAMUEL A. ETTIELSON,
Corporation Counsel.

Elevation of Railroad Tracks.

October 4, 1922.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.
Dear Sir:

Replying to your request for an opinion relative to the power and authority of the City of Chicago, under the track elevation ordinances now in force, to proceed with the work of elevating the tracks and charging the expense thereof to the respective railroads, we beg to submit the following.

All of the ordinances in question were duly passed by

the City Council and accepted by the respective companies, and therefore they constitute, under the uniform rulings of our courts, *contracts*, between the city and the railroad company or companies concerned.

Each of the ordinances contained substantially the following paragraph:

“Section 15. That the railway and railroad companies required by this ordinance to elevate their tracks, shall do the work of elevating their tracks and such other work in accordance with the terms hereof, in apt and proper time. Should said company, or companies, fail or neglect to so prosecute their work, the commissioner of public works shall have and is hereby given the right, power and authority to give to said company or companies, ten (10) days’ notice in writing to prosecute such work. If after the expiration of the time mentioned in said notice, said company or companies shall fail or neglect to comply with said notice, the commissioner of public works may take charge of and cause the work herein required by said company or companies to be done, to be performed, and thereupon the expense thereof shall be charged to such delinquent company or companies, and if such expense is not paid to the City of Chicago within ten (10) days after a demand therefor, said company or companies shall be liable to said City of Chicago in an action of assumpsit for the amount so expended.”

Council Proceedings, April 22, 1912, p. 3531.

That cities have power to order railroads to elevate their tracks, has frequently been held.

Murphy v. C. R. I. & P. Ry. Co., 247 Ill. 614.

Weage v. C. & W. I. R. R. Co., 227 Ill. 421.

People v. Grand Trunk Ry. Co., 232 Ill. 292.

People v. A., T. & S. F. Ry. Co., 217 Ill. 594.

Chicago v. P., C. C. & St. L. Ry. Co., 244 Ill. 220.

Summerfield v. City of Chicago, 197 Ill. 270.

City of Chicago v. Jackson, 196 Ill. 496.

Osburn v. City of Chicago, 105 Ill. App. 217.

In the case of *Murphy v. C. R. I. & P. Ry. Co.*, 247 Ill. 614, our Supreme Court said:

“The terms of the track elevation ordinance in ques-

tion do not differ in essential respects from those involved in the cases of *Weage v. Chicago and Western Indiana Railroad Co.*, 227 Ill. 421, *People v. Grand Trunk Railway Co.*, 232 *id.* 292, *City of Chicago v. Pittsburgh, Cincinnati, Chicago and St. Louis Co.*, 244 *id.* 220, and *People v. Atchison, Topeka and Santa Fe Railway Co.*, 217 *id.* 594. The power of the Council to pass such an ordinance is not an open question nor is the source of its authority doubtful. It is from the police power that the Council gets its right. Having the power, the Council is limited in its exercise only by the requirement that the ordinance shall be reasonable."

Since the present ordinances have been voluntarily and expressly *accepted* by the railroad companies concerned, the question of the reasonableness of the same must be regarded as settled.

The act creating the Illinois Commerce Commission provided:

"The commission shall have general supervision of all public utilities, except as otherwise provided in this act."

Public Utilities Act, Sec. 8.

This general authority, however, did not, in our opinion give the commission any authority to make any regulations which would violate the terms of any lawful *contracts* theretofore entered into between a city and a railroad company, for in such event the statute would have violated Section 14 of Article II of our State Constitution, which reads:

"No *ex post facto* law, or law impairing the obligation of contracts * * * shall be passed."

After a contract has once been honestly and fairly entered into, upon a legal consideration, there is no reason why it should not be lived up to by both parties, unless of course it is in violation of the State or Federal Constitution. If a state contract, for instance, encroaches improperly upon the right of the federal government to regulate interstate commerce, it is unconstitutional and void. But regulations which affect interstate commerce only incidentally, but which primarily are for the protection of life and limb and do not

contravene any laws passed by congress, are not in contravention of the U. S. Constitution.

Gibbons v. Ogden, 9 Wheat 1, 203, 211.

Willson v. Blackbird Creels., 2 Pet. 245.

Cooley v. Philadelphia Board of Wardens, 12 How. 299, 320.

Gilman v. Philadelphia, 3 Wall. 713.

Sherlock v. Alling, 93 U. S. 99, 104.

Mobile v. Kimball, 102 U. S. 691.

Escanaba Co. v. Chicago, 107 U. S. 678.

Morgan v. Louisiana, 118 U. S. 455, 463.

Huse v. Glover, 119 U. S. 543.

Smith v. Alabama, 124 U. S. 465.

Nashville, etc., Ry. v. Alabama, 128 U. S. 96, 100.

Western Union Tel. Co. v. James, 162 U. S. 650, 662.

Hennington v. Georgia, 163 U. S. 299, 317.

N. Y., N. H. & H. Railroad Co. v. N. Y., 165 U. S. 628.

In the case of *N. Y., N. H. & H. Railroad v. New York*, 165 U. S. 628, the Supreme Court of the United States said:

“According to numerous decisions of this court (some of which are cited in the margin), sustaining the validity of state regulations enacted under the police powers of the state, and which incidentally affected commerce among the states and with foreign nations, it was clearly competent for the State of New York, in the absence of national legislation covering the subject, to forbid under penalties the heating of passenger cars in that state, by stoves or furnaces kept inside the cars or suspended therefrom, although such cars may be employed in interstate commerce. While the laws of the states must yield to acts of Congress passed in execution of the powers conferred upon it by the Constitution, *Gibbons v. Ogden*, 9 Wheat. 1, 211, the mere grant to Congress of the power to regulate commerce with foreign nations and among the states did not, of itself and without legislation by Congress, impair the authority of the states to establish such reasonable regulations as were appropriate for the protection of the health, the lives and the safety of their people.”

That contracts lawfully entered into between a public utility and a municipality must be lived up to, has always been the doctrine of the Supreme Court of the United States. In the case of *Columbus Ry. & Power Co. v. City of Columbus*, 249 U. S. 399, the court, in interpreting a decision previously rendered, said, on page 412:

“It certainly was not intended to question the principle, frequently declared in decisions of this court, that if a party charge himself with an obligation possible to be performed, he must abide by it unless performance is rendered *impossible* by the act of God, the law, or the other party. *Unforeseen difficulties will not excuse performance*. Where the parties have made no provision for a dispensation, the terms of the contract must prevail. *United States v. Gleason*, 175 U. S. 588, 602, and authorities cited; *Carnegie Steel Co. v. United States*, 240 U. S. 156, 164, 165. The latest utterance of this court upon the subject is found in *Day v. United States*, 245 U. S. 159, in which it was said: ‘One who makes a contract can never be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking.’”

Another question which might arise is, whether, in case the city undertook to do the work of track elevation, it would have to complete *all* the work specified in the contract, before it can demand payment from the railroad company, or whether it can recover payment as soon as it has completed some definite portion of the work to be done,—in other words, whether the contract is *divisible* or an *entirety*. As we understand each of the railroad companies has already performed a part of the work to be done, but refuses to go on with the remainder, it is clear that they have treated the ordinance as a divisible contract and they would therefore, in our opinion be estopped from taking any other position if the city should enter upon the continuation of the work. We believe also that it is customary to regard such work as divisible and that the City Council so regarded it when it passed the ordinance.

For the reasons above set forth, we are of the opinion that if the railroad companies in question, or any of them, refuse or neglect to complete the track elevations provided

for by the ordinances in question, passed by the City Council and accepted by the respective railroad companies, the city through its commissioner of public works, may itself after due notice, proceed to complete the work, and collect the expenses thereof as the work progresses.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Amount of Police Pensions Under Annuity and Benefit Fund Act.

October 10, 1922.

RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND BENEFIT FUND OF THE CITY OF CHICAGO, R. 1002, City Hall.

Gentlemen:

I am in receipt of the applications of the above named persons who seek pensions as the result of the death of their husbands while members of the Department of Police of the City of Chicago, together with your request for an opinion as to the amount of pensions the above named applicants are entitled to receive.

An investigation of the applications, together with the other papers forwarded, discloses that the death in each case occurred as the result of injuries sustained by the deceased husbands of the respective applicants while in and in consequence of the performance of police duty.

William P. Casey, husband of the applicant Margaret Casey, died on the 9th day of August, 1922.

Timothy J. Crowley, husband of the applicant Norah Crowley, died on the 4th day of August, 1922.

In order to determine the amount of the pensions to which both of the above named applicants are entitled, it is only necessary to call the attention of the board to the provisions of Section 33 of an act entitled, "An Act to provide for the creation, setting apart, maintenance and administration of a policemen's annuity and benefit fund in cities hav-

ing a population exceeding two hundred thousand inhabitants," approved June 29, 1921, and in force and effect January 1, 1922, which section provides that in any case in which annuity provided in accordance with the provisions of the said act for the widow of any policeman whose death shall result from injury incurred in the performance of any act or acts of duty shall not be equal in amount to seventy-five (75) per cent of the salary of such policeman as such salary shall be at the time of the injury of such policeman. "Compensation Annuity" equal in amount to the difference between the amount of annuity provided for such widow in accordance with the provisions of such act and an amount equal to seventy-five (75) per cent of the salary, as aforesaid, of such policeman shall be provided for and paid to such widow until the time when such policeman, if alive, would have attained the age of fifty-seven (57) years.

You are, therefore, advised that the applicants Norah Crowley and Margaret Casey, respectively, are each entitled to receive a pension on a basis of seventy-five (75) per cent of the annual salary that their husbands were entitled to receive at the time of their death as members of the Chicago Police Department, together with \$10 per month in addition for each child under the age of eighteen (18) years.

I return herewith the applications of Norah Crowley and Margaret Casey, together with enclosures which were attached thereto.

Yours very truly,

JAMES W. BREEN,
Acting Corporation Counsel.

Signatures for Filling Station.

October 24, 1922.

MR. JOHN PLANT, Acting Chief, Bureau of Fire Prevention
and Public Safety.

Dear Sir:

With reference to Section 5 (205 as amended to date, of the Inflammable Liquids Ordinance, supplementary to the Fire Prevention Ordinance), we have your request for an opinion on the following question:

“Am I justified in refusing to receive or entertain any application for a filling station from any person whose signature appears thereon other than the owner or lessee of such lot or plot of ground?”

That part of Section 5A (205) aforesaid, as amended to date, in so far as the question presented is concerned provides:

“Any person, firm or corporation desiring to install a tank for the storage of any of the liquids mentioned in Section 2 (202) and Article XVIII of this ordinance, shall first obtain a permit *soto do* from the chief of fire prevention and public safety, etc., etc.”

The City Council could have indicated more specifically precisely what it intended by the use of the phrase “*any person, firm or corporation desiring to install a tank, etc.,*” and thus have clarified the situation, but regardless of that fact this office is of the opinion that it only contemplated *bona fide* cases wherein the applicant acts in good faith.

As a result of the latter construction of the aforesaid ordinance, which we think is justified, considering the phraseology used in the section, and reading it in connection with the entire ordinance, we are of the opinion that your department is justified in refusing to consider applications of any individuals or corporations which do not appear to you to be made in good faith and to be *bona fide*. There is probably no doubt but that the City Council, as we read and construe the ordinance, had reference to property owners, their lessees or agents, contemplating the installation of oil tanks, and intended that your department should be permitted to exercise certain discretionary powers in determining whether or not the application presented is, in each case, within the purview of the ordinance, taking into consideration a reasonable construction of the same, such as we have above indicated.

Very truly yours,

J. C. SCOFIELD,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Length of Time Temporary Zone of Quiet May Be Maintained.

October 24, 1922.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

In response to your verbal request for an opinion as to how long you have authority to continue a temporary zone of quiet, we advise you as follows:

The last sentence of Section 2478a of The Chicago Code of 1911, as amended December 7, 1914 (pages 2408 and 2409 of the Journal of the Proceedings) reads as follows:

“No temporary zone of quiet established pursuant to the provisions of this article shall be maintained or continued upon *one application* for a longer period than fourteen days from the date when the same is established.”

Section 2478b as amended June 23, 1920 (page 544 of the Journal of the Proceedings), reads as follows:

“2478b. FEE.) The applicant shall pay to the city collector, prior to the approval of the application by the commissioner of health, a fee of ten dollars (\$10) for the investigation and establishment of a temporary zone of quiet.”

It is therefore our opinion that you have the authority to renew a zone of quiet permit as many times as you deem necessary, provided, however, that a fee is collected with each application.

Yours very truly,

FRANK W. DERBY,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Duty to Rebuild Sewer.

October 26, 1922.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

We are in receipt of your request for an opinion relative to the duty of the City of Chicago to rebuild the sewer emptying into the north branch of the Chicago River outside of the dock line at what was, before its vacation, McLean avenue.

The material facts as we understand them, are as follows: In 1884 the city built a sewer in Armitage avenue, Mendell street and McLean avenue, emptying into the north branch of the Chicago River at the foot of McLean avenue. In 1907 this sewer was rebuilt as a nine foot sewer. It was built, in the regular permanent manner, up to the dock line of the river, at the foot of McLean avenue, as such dock line is shown by the plat of the subdivision; from this point—the official dock line—to the actual water line—located about 50 feet riverward, the sewer was merely of temporary construction—a wooden box.

On January 24, 1916, the City Council vacated McLean avenue between Mendell street and the river, without any express provision regarding the sewer under the same. After this vacation a small building was erected over the temporary sewer (on what was provisionally McLean avenue extended) outside of plat or subdivision dock line of the E. I. Du Pont de Nemours & Co., a corporation the owners of land lying south of McLean avenue, and they have since notified the city that the part of the sewer east of the plat dock line (being of temporary construction, as above stated) has given way and caused settlement of the building, built over it as aforesaid, and they therefore request the city to repair said part of the sewer at once, in order to prevent further damage to their said property.

In our opinion, the city owes no duty to repair the temporary sewer outside of the dock line, for the purpose of preserving buildings located there (there being no rights of the

general public involved). For we can find no authority for the erection of any buildings there.

By the plat of the subdivision in question, the title to McLean avenue at the place in question was vested in the City of Chicago. The company which erected the building in question evidently did so on the assumption that the vacation of McLean avenue by the city gave to the company, as abutting owner, title to the land which had theretofore constituted the street and also title to the bed of the river, opposite such street, as far as the middle of the thread of the stream. This is, no doubt correct, so far. That the fee title to a street passes, upon vacation, to the abutting property owners, has been expressly held by our Supreme Court (*Prall v. Burckhardt*, 299 Ill. 19). And that the title to the bed of the Chicago River, and all other rivers in this state, is in the abutting property owners, is also well settled.

Middleton v. Pritchard, 3 Scam. 510.

Canal Trustees v. Havens, 11 Ill. 554.

City of Chicago v. M'Ginn, 51 Ill. 266.

Washington Ice Co. v. Shortall, 101 Ill. 46.

Ballance v. City of Peoria, 180 Ill. 29.

People v. Economy Power Company, 241 Ill. 290.

But it is also well settled (and so held in the group cases last cited) that such title to the bed of a navigable river is subject to an easement, vested in the public, for purposes of navigation, fishing, etc. The right of a city to use a river for drainage purposes, while not a natural right, may be acquired by *prescription*—and the right of the City of Chicago to use the Chicago River for such purposes has been exercised for such a long period of years that it cannot now be questioned.

Missouri v. Illinois, 200 U. S. 496.

Cleveland v. Standard Bag Co., 72 Ohio St. 324.

Smith v. Sedalia, 152 Mo. 283.

Black's *Pomeroy on Water Rights*, Sec. 152.

Angell on *Water Courses*, Sec. 208.

Gould on *Waters*, Sec. 329,

It follows from the above, that, even if we grant the validity of the vacation of McLean avenue, and grant that the company in question thereby acquired the fee title to the street and to that portion of the bed of the river abutting on such street, nevertheless the company would have no right to build any permanent structure outside of the dock line and thereby encroach upon the river—a public highway of the state.

The objection may be raised that the dock line had long before been encroached upon, and that for many years a line about 50 feet riverward from the plat dock line had been used as the actual dock line of the river. That objection might indeed have been entitled to some weight, if the city, by reason of such occupation of such additional space outside of the dock line, had laid claim to the same as a part of McLean avenue, and, by holding the same under such claim of right for a sufficient period of time had established a right thereto by *prescription*. But we find no evidence of any such claim on the part of the city. Indeed, by building the permanent sewer exactly to the plat dock line, and stopping there, using merely a temporary wooden box to convey the sewage from that point to the thread of the stream, it clearly appears that the city recognized said dock line as the end of McLean avenue and claimed no title to the land beyond such line.

By the vacation of the street the abutting property owners acquired no greater right or title to the same than the city had previously had; and as the city always recognized that the street stopped at the dock line, and the river began there, so must the present owners recognize the same fact. For they have not held the property long enough to claim any rights by prescription, the vacation of the street having taken place only six years ago. Nor has their occupation been *exclusive* and *adverse* (also necessary elements to a title by prescription), for during all the time that the company has been in possession of the strip of ground, the city has also occupied it with its sewer. It is evident therefore that no question as to any title by prescription can arise in this case.

It should be borne in mind, also, that the statute of limitations does not run against the state, or a subdivision or municipality thereof, so far as any *public* rights (including rights to a public highway) are concerned. Such a thing as an *equitable estoppel* might, indeed, sometimes arise, where the state or a municipality has silently permitted a private party to occupy a highway for a large number of years and erect such *valuable improvements* thereon that it would be unconscionable to forfeit the same, but aside from this principle, mere lapse of time or adverse possession will not deprive the state or a municipality of its right to streets, rivers or other public highways.

Jordan v. City of Chenoa, 166 Ill. 530.

Lee v. Town of Mound Station, 118 Ill. 304.

As we understand that the building erected by the company in this case is neither large nor particularly valuable (being a cheaply built, one-story structure, walled with galvanized iron sheeting), all the elements of *exclusive* and *adverse* possession, *lapse of long period of time* and *valuable improvements*, are all wanting, so far as the present purported owners are concerned.

It has frequently been held by our courts that a navigable river is a *public highway* and that an abutting property owner has no more right to encroach upon a river than he has to encroach upon a street. In *People v. City of St. Louis*, 10 Ill. 351, our Supreme Court said (p. 369):

“By the fourth article of the ordinance of 1787, it is provided, ‘that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other state that may be admitted into the confederacy, without any tax, impost or duty therefor. * * *

“The several states may, within their own jurisdictions, do whatever they please with this river, so as they do not infringe upon these rights, nor otherwise violate the rights of others. * * * They may change the current of this river, or even stop up some of its confessedly navigable channels, whenever they find it

necessary to their own well being, the same as any other highway, taking care that they leave a free navigation to those who have a right to navigate it. * * *

"But because the state may do this in its sovereign capacity, it does not follow that any individual, over whose land the river flows, may do the same. The state may shut up or abolish a public road running over my land, while if I obstruct it without the sanction of law, I erect a nuisance, although the road may be entirely unnecessary * * *

"We fully recognize their (the riparian owners') right to make any erections on their own land, which do not infringe upon the public easement, but they have no more right to erect a nuisance in the public highway, than if the title to the land was in the state. *It is not for individuals, but for the state to judge, whether the whole of the public highway is necessary for the public accommodation or not.* Hence it has been repeatedly held, that any erection or obstruction placed in any part of a public road or street which deprives the public of the use of any part thereof, is a nuisance."

But aside from the rights of the State of Illinois over the Chicago River, we must also bear in mind the rights of the federal government over the same; and the building erected by the E. I. Du Pont de Nemours & Co., was, in our opinion, clearly a violation of the Rivers and Harbors Act, passed by Congress in 1899, Section 10 of which reads as follows:

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphins, boom, weir, breakwater, bulkhead, jetty or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the chief of engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United

States, unless the work has been recommended by the chief of engineers and authorized by the secretary of war prior to the beginning of the same."

When the city in 1907 rebuilt the sewer in question, it carefully complied with this federal law, by making the permanent sewer end at the official dock line. When, on the other hand, the company erected a building outside the dock line, it violated this law, and its building accordingly constitutes a purpresture and a nuisance and is entitled to no protection from the city.

It might not be out of place to say a word relative to the validity of the ordinance vacating McLean avenue. It seems that the City Council, in passing the ordinance, did not specifically reserve an easement in the street for its existing sewer but apparently the benefited property owners have recognized such an easement. Were it not for such a saving condition—express or implied—we are of the opinion that the courts would hold the vacation to be void. For a reference to the street map of the city will show that McLean avenue, while it may have been useless and unnecessary to the city for other purposes, was at least very essential as a location for a sewer emptying into the river, and our Supreme Court has held in a number of recent cases that it is beyond the power of the City Council to vacate a street so necessary to the convenience of the public that the vacation must be presumed to have been made principally for the benefit of private individuals and not for the benefit of the public, which latter ground is the only theory on which a vacation can be sustained.

C. R. I. & P. Ry. Co. v. People, 222 Ill. 427.

People v. Corn Products Refining Co., 286 Ill. 226.

People v. Benson, 294 Ill. 236.

People v. Atkins, 295 Ill. 165.

People v. E. J. & E. R. Co., 298 Ill. 578.

But as no one appears to question either the vacation of McLean avenue, or the right of the city still to maintain a sewer under the same, we deem it unnecessary to say anything further on this point.

Reverting therefore to the question more particularly at issue, we are of the opinion that the vacation of McLean avenue, east of Mendell street, while it probably transferred the fee title to such street to the abutting property owners, did not confer upon them any right to encroach upon the Chicago River, outside of the dock line established by the plat of the subdivision, nor have they, since said vacation, acquired any such right; that therefore any building, built outside of such dock line and over the temporary sewer constructed by the city, was illegally built, and constitutes in law a purpresture and a nuisance and that the city is under no obligation to rebuild or repair its said temporary sewer for the sole purpose of protecting such illegally built building from injury. If the outlet to the sewer were obstructed, the city would doubtless owe a duty to the *general public* to see to it that the same were kept open; but no such question arises in this case.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Suppression of Use of Sirens.

October 28, 1922.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

In reply to your verbal request for an opinion relative to your authority as health commissioner, to suppress the immoderate use of sirens and other unseemly noises within the city, we respectfully submit the following:

Section 1429 of The Chicago Code of 1911 reads as follows:

“In all cases where no provision is herein made defining what are nuisances and how the same may be removed, abated or prevented in addition to what may be declared such herein, *those offenses which are known to*

the common law of the land and the statutes of Illinois as nuisances may, in case the same exist within the city limits or within one mile thereof, be treated as such, and proceeded against as is in this article provided, or in accordance with any other provision of law.”

Now, loud noises in close proximity to human habitations or places of business did undoubtedly constitute *nuisances* at common law.

In the case of *C. M. & St. P. Ry. Co. v. Drake*, 148 Ill. 226, 232, the Supreme Court of this state said:

“It can not be doubted that, at common law, mere noise in the immediate vicinity of the premises, and especially of the dwelling-house of a land owner, may be of such character as to constitute an actionable nuisance, remediable by an action on the case for damages or by injunction. *Crump v. Lambert*, L. R. 3 Eq. Cas. 409; *Broder v. Saillard*, L. R. 2 Chan. Div. 692; *Davis v. Savage*, 133 Mass. 289; *Bishop v. Banks*, 33 Conn. 118; *Fisher v. Dodge*, 4 Denio 311; Bispham *Eq.* (5th ed.), Sec. 441; Wood on Nuisances, Chap. 18.”

It will thus be seen: (1) that immoderate noises constitute a nuisance at common law, and (2) that the commissioner of health has a general power to suppress nuisances that have any reasonable bearing upon public health.

In view of the fact, however, that the power thus conferred upon the commissioner of health is not very clearly defined, but is of this very general character, it is our opinion that it should be exercised with great caution and confined to cases that are clearly of a flagrant nature, where not only the noises are immoderately and unnecessarily great, but also their bearing upon the public health is indisputable.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Motor Trucks and Tractors and Trailers Ordinances.

October 31, 1922.

HON. CHAS. C. FITZMORRIS, Superintendent of Police.

Dear Sir:

Your communication of the 23rd inst., enclosing a letter addressed to you from Messrs. McKinley and Schmauch, attorneys for Consumers Company, and in which you ask for an opinion as to whether or not certain motor vehicle equipment, known as No. 176, owned and operated by Consumers Company, should be classified as a motor truck or as a tractor and trailer under certain city ordinances concerning both motor trucks and tractors and trailers, was duly received by this office and as the questions involved were of great public importance, we deemed it advisable personally to view said motor vehicle equipment in question, which fact is responsible for our delay in answering your inquiry.

Messrs. McKinley and Schmauch requested your answer by October 27, if possible, but as Consumers Company were unable to arrange for us to see the motor vehicle equipment involved until yesterday, October 30, it was necessary to procure a continuance of the Consumers Company case, which continuance was granted by Judge Eller. This procedure was followed after consultation with Messrs. McKinley and Schmauch and with their consent. The case next arises at the Englewood branch of the Municipal Court on November 14, 1922.

The question here to be determined is whether or not the equipment used by Consumers Company, designated by them as tractor with semi-trailer, of the same class and construction as No. 176, that being the equipment in dispute, is to be classed as a truck and therefore to be considered within the purview of an ordinance, "For Regulating the Speed, Capacity and Dimensions of Motor Trucks, Using the Public Highways," passed by the City Council May 17, 1915, and found at page 270 of the Journal of Council Proceedings for that date, or whether such equipment is to be classed as a tractor and trailer and therefore to be con-

sidered within the purview of an ordinance, "For Regulating the Speed, Capacity and Dimensions of Tractors and Trailers Using the Public Highways," passed by the City Council May 17, 1915, and found at page 271 of the Journal of Council Proceedings for that date.

The ordinance concerning *motor trucks* passed May 17, 1915, defines the equipment referred to therein as follows:

"Section 2. For the purpose of this ordinance a motor truck shall be defined as a self-propelled vehicle commonly used for commercial purposes, carrying its load as a single unit, with non-detachable propelling power, equipped with tires of rubber or some material of equal resiliency."

The ordinance concerning tractors and trailers, passed May 17, 1915, defines the equipment referred to therein as follows:

"Section 2. For the purpose of this ordinance a tractor shall be defined as a self-propelled vehicle, commonly used for commercial purposes, with tires of rubber or some material of equal resiliency, and which is used to haul one or more vehicles. A trailer shall be defined as a vehicle which is not self-propelled and which is attached to a tractor when operated."

The equipment in the instant case consists of what is designated as a so-called tractor with semi-trailer, which phraseology is not included in the ordinance concerning tractors and trailers. Consumers Company motor vehicle No. 176, consists of a so-called tractor, self-propelled and resting on two axles, each axle carrying one wheel at either end thereof. The rear axle of the so-called tractor, is also the forward axle of the semi-trailer, which semi-trailer rests on a turn table and which turn table is permanently attached to and a part of the superstructure of the so-called tractor. A horizontal king pin or bolt, about a yard long, secured at each end with a heavy cotter pin, passing through part of the frame of the semi-trailer and part of the frame of the so-called tractor, holding the two together, is the means of connection between the so-called tractor and semi-trailer. The semi-trailer can be readily detached from the so-called tractor

by removing the king bolt and placing jacks under both sides of the forward part of the semi-trailer. In case the so-called tractor is disconnected from the semi-trailer, and driven away from the same, as the semi-trailer has only one axle at the rear part thereof, it then becomes necessary to support the forward part of said semi-trailer, by jacks, to prevent the same from falling to the ground.

While it is thus possible to detach the semi-trailer from the so-called tractor, nevertheless, the same is not, as a matter of fact, done, and for commercial purposes it would not be practical. The equipment, as will be seen from the attached photograph of a motor vehicle, similar in every respect to No. 176, gives the appearance of a tractor and trailer, and in the opinion of this office, it could be very easily held to be such, but, on the other hand, it is not a difficult problem to reach the conclusion that such an equipment is in fact, a modified motor truck or a specially constructed motor truck, cleverly designed to escape the provisions of the motor truck ordinance and yet sufficiently like a truck, the latter being more practical than separate tractors and trailers for commercial purposes, to be classified as a motor truck, and therefore within the purview of the tractor and trailer ordinance which is the more favorable ordinance of the two for the owner from the standpoint of the load each is permitted to carry.

In addition, the so-called tractor in this case is not only the motive power used for pulling or hauling the semi-trailer and its load, but it will be noticed that the rear axle of the so-called tractor is equivalent to the forward axle of the semi-trailer and carries at least half of the weight of the body of the semi-trailer, as well as half of the load, which fact, in our opinion, makes the so-called tractor *more* than the City Council had in mind when it designated a tractor "as a self-propelled vehicle commonly used for commercial purposes * * * and which is used to haul one or more vehicles."

Considering the phraseology of the sections of the ordinance above quoted, the so-called tractor in this case is a "self-propelled vehicle, used for commercial purposes," but in addition to being used for the purpose of *hauling* one or

more vehicles it carries half of the weight and load of the semi-trailer, and the semi-trailer in this case, while it is not "self-propelled" and is "attached to the so-called tractor when operated," *remains attached* to, and a part of the so-called tractor at all times. In other words, we seek to differentiate between what the ordinance meant by the use of the words, "tractor and trailer" and the equipment here in question, and we are of the opinion that the City Council had in mind, a separate, self-propelled vehicle to be used for the *sole* purpose of *hauling, towing or pulling* another separate vehicle resting on two axles and four wheels which latter vehicle is not self-propelled, but which depends upon the former vehicle for its motive power, though it is capable of standing alone, unsupported.

With reference to the motor truck ordinance it will be noted that the equipment in question herein is a "self-propelled vehicle, commonly used for commercial purposes, carrying its load as a single unit," for the reason that while the semi-trailer can be detached from the so-called tractor, it is in fact not detached, and it would not be practical, from a commercial point of view, to detach the same, and furthermore, if the semi-trailer should be detached from the so-called tractor, without some additional agency for purposes of support, the semi-trailer could not of itself support a load. In addition, with reference to the same ordinance, the so-called tractor and semi-trailer are, in a sense, non-detachable, for if the same are detached, whether loaded or light, the semi-trailer is useless for commercial purposes as it has only one axle.

On the day of the alleged violation of the motor truck ordinance, motor vehicle No. 176 of Consumers Company equipment, carried a load weighing 26,300 lbs. The equipment without a load exceeds 13,500 lbs., so that the gross weight was clearly in excess of 39,800 lbs. The motor truck ordinance provides that no such vehicle shall carry a load of such weight, and that the maximum gross weight of vehicle and load combined shall not exceed 30,000 lbs. If said equipment is to be classified as a truck, within the purview of the

motor truck ordinance, it was carrying an excess weight of 9,800 lbs., at least, and was thus in violation of the ordinance. If, on the other hand, such equipment is to be considered as a tractor and trailer, it was clearly within the law, as the tractor and trailer ordinance provides, "Nor shall the total weight resting upon any axle of same exceed 24,000 lbs." In the latter case this equipment would be entitled to carry a maximum gross weight of 48,000 lbs., upon two axles of the semi-trailer.

This office considers the question a very close one and appreciates that sound argument can be made for either classification. In fact it is difficult to reach a decision, considering the construction of the equipment, together with the wording of the ordinance, and it is quite possible that a court might feel justified in deciding such a problem one way or the other. However, as the question must be determined ultimately, we recommend that such an equipment should be classified as a truck and not as a tractor and trailer, which will necessarily bring the question to an issue immediately and assist in a ready settlement of the issue once and for all.

There is no doubt but that if such equipment were to be considered as a tractor and trailer, the additional weight the same would be permitted to carry under the tractor and trailer ordinance would become one of the strongest factors in damaging the city pavements, and as the interests of the public are immediately concerned, we feel that its rights should be most scrupulously safeguarded and protected by the municipal departments to whom such duties are delegated.

Yours very truly,

J. C. SCOFIELD,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Rights of City to Streets Near River Between Roosevelt Road and 14th Street.

November 2, 1922.

ALDERMAN ANTON J. CERMAK, Chairman, Committee on Railroads, Industries and Compensation.

Dear Sir:

We are in receipt of your communication, relative to the rights of the city in certain streets between Roosevelt road and 14th street and between the river and the west line of Dodge street, together with a copy of an opinion by the corporation counsel relative thereto, dated March 18, 1914, holding that the ordinance, vacating Dodge street and other streets there, had never been fully complied with and that said streets had never, therefore, been legally vacated. We note your inquiry whether any change in the legal status of the matter has occurred, since last mentioned date, affecting in any way the respective rights of the city and the Baltimore & Ohio Chicago Terminal Railroad Company in said streets.

In reply we beg to state that we have carefully investigated the matter and find that there has been no change in the situation so far as the B. & O. C. T. Railroad Co. is concerned. The rights of the Pennsylvania Railroad Company, (which is the abutting property owner on the west side of Dodge street), were, however, slightly affected by an ordinance of March 23, 1914 (C. P. 4573), subsequently accepted by the company, which vacated a few feet (a small triangular slip) off the west side of Dodge street at its intersection with Roosevelt road. This vacation, however, unimportant in itself, but formally accepted by the Pennsylvania Company, doubtless strengthened rather than weakened the city's claim to the rest of the street, so far as the last mentioned company is concerned, for it was at least a formal notice by the city and a more or less formal admission by the company that there was still such a street as Dodge street. And so far as the Baltimore & Ohio Chicago Terminal Railroad Company (the abutting land owner on the east side of

Dodge street) is concerned, the situation is precisely the same as it was when the corporation counsel's opinion of March 18, 1914, was written.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Lease for City Playground Located at 16th Street and
Hamlin Avenue.**

November 2, 1922.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

This office is in receipt of your communication of the 31st ultimo. enclosing copy of above lease, letter and notice terminating said lease, which are herewith enclosed and returned, and in which letter you request us to advise the comptroller as to whether or not the said notice is sufficient to terminate the tenancy on December 31, 1922.

The written lease by and between Charles M. Sturges and the City of Chicago for the premises in question was a lease for a fixed period and therefore terminated by its own terms on December 31, 1920, without any notice of termination being required or necessary. However, by remaining in possession and holding over beyond the period of the written lease for *more* than a year, without holding adversely, with the consent of the lessor, which was evidenced by the lessor's acquiescence, without renewal of said lease, either verbally or in writing, and by complying with the terms, conditions and covenants of the written lease, there was thereby created a *tenancy from year to year* by and between Charles M. Sturges and the City of Chicago.

Streit v. Fay, 230 Ill. 319.

Section 5 of the Landlord and Tenant Act, Chapter 80, Smith's Illinois Revised Statutes for 1921, page 1189, pro-

vides for the requisite notice to terminate a tenancy from year to year as follows:

“§5. In all cases of tenancy from year to year, sixty days' notice, in writing, shall be sufficient to terminate the tenancy at the end of the year. The notice may be given at any time within four months preceding the last sixty days of the year.”

Accordingly, as the tenancy in question was one from year to year, and as the lessor, or his agent, has served the statutory 60 day notice on the city, as lessee, at least 60 days next preceding December 31, 1922, terminating said tenancy, this office is of the opinion that the notice is sufficient and does operate to terminate said tenancy on said date.

Yours very truly,

J. C. SCOFIELD,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Guarantee Clause in Fire Department Contract.

November 3, 1922.

MR. JOHN F. CULLERTON, Business Manager, Fire Department.

Dear Sir:

I am in receipt of your request for an opinion as to the construction of the guarantee clause to be used in connection with the purchase of fire hose. The material parts of the clause are as follows:

“If at any time within a period of five years the rubber parts of any section burst, * * * such hose shall be replaced by the contractor with new hose at cost to the City of Chicago equal to that per cent of the original cost as the time is to five years.”

This means that if the hose is to be replaced for a breach of the guarantee before the expiration of five years, the city shall pay for such replaced hose an amount which shall bear the same ratio to the original cost as the period of time prior

to the breach of the guarantee bears to the full period of five years. For example, if the city paid five hundred dollars for hose with this five year guarantee and at the end of one year the hose was to be replaced for a breach of the guarantee, then the city would pay one hundred dollars toward the replacement of the defective hose.

In the foregoing I am expressing no opinion as to when the period of time during which the hose is in use begins to run as I understand this question is not now before you.

The other form of guarantee submitted is as follows in its material parts:

“And the said party of the first part does hereby guarantee and warrant that said hose shall be free from any defects in manufacture, and does hereby guarantee and warrant said hose for a period of five years, * * * and agrees to replace such hose free of charge.”

Under this form, in the event of replacement of hose for a breach of the guarantee, the replacement shall be made without cost to the city without regard to the length of the use which the city may have had of it.

Respectfully submitted,

SHIRLEY T. HIGH,

Assistant Corporation Counsel, Fire Attorney.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Sale of Fish by Members of Association.

November 9, 1922.

HON. EDWARD J. KAINDL, Chairman, Committee on High Costs and High Rents.

Dear Sir:

Replying to your communication of the 6th instant requesting an opinion from the corporation counsel as to whether any person who is not a member of the Retail Fish Dealers Association would be entitled to engage in the business of selling fish, and if your committee could assure them

proper protection in the conduct of their business, permit us to say:

The law knows of no such governmental entity as the Retail Fish Dealers Association, and any person desiring to engage in the business of selling fish, or any other lawful occupation, has a perfect legal right to do so, without asking the advice or consent of any extra-governmental body. Indeed, as we stated in our opinion to you of June 8, 1922, on the same subject, if the purpose of the Retail Fish Dealers Association is to stifle competition, it is an unlawful combination in restraint of trade, and its members are guilty of conspiracy.

As to your question "if this committee could assure those engaging in the fish business proper protection in the conduct of their business," we do not quite understand what you have reference to. We have no reason to assume that there is any more danger that such merchants would be molested in the lawful conduct of their business than there is in the case of any other merchants. Being clearly entitled to the same protection, we assume also that they will receive it. So much, we think, you can properly assure them of.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Custody of Real Estate Records of School Property.

November 9, 1922.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

We are in receipt of your letters and attached documents concerning the proposed transfer of deeds, abstracts and other records relating to school property to the Board of Education.

Heretofore these instruments have been kept in the vault of the comptroller by virtue of the provision of Section 24

of The Chicago Code of 1911, which says that he "shall have charge of all deeds, mortgages," etc., "except such as are directed by law or ordinance to be deposited elsewhere."

The Board of Education, under the law of 1917, became a municipal corporation. Whatever reason there may have existed before that time for having the records in question in the hands of the comptroller was done away with then. The new act enlarges the powers of the board with respect to real estate held for school purposes. It may be that the said act inferentially even gives authority for turning over the papers without any action on the part of the City Council, since the city only takes title as trustee for the use of schools.

Nevertheless, in order that there may be no question raised as to the propriety of turning over the documents, we suggest that the code be amended in this respect. We have prepared draft of an amendatory ordinance which will accomplish this and forward same herewith.

We also return herewith the letter of the business manager of the Board of Education dated October 11, 1922.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Funds for Proposed Automotive Apparatus Sinking Fund.

November 13, 1922.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

You forwarded to this office your letter requesting an opinion as to the legality of creating at this time and for use during the current year an "Automotive Apparatus Sinking Fund" out of moneys appropriated for various other purposes, there having been no appropriation specifically designed for such a fund.

Accompanying your letter is a communication addressed to you under date of September 22, 1922, from the commissioner of public works, a request for transfer of appropriations, a tentative draft of a proposed ordinance, and a number of copies of a schedule showing the city engineer's plans for financing and replacement. These documents show in detail what is contemplated and the manner of procedure.

Briefly stated, the proposed plan consists in creating a fund which is to be used for replacing motor truck equipment so as to keep such vehicles at a high standard at all times, the fund to be replenished from appropriations to the various bureaus which maintain such equipment. There having been no appropriations for this purpose, however, for the current year, it will be necessary to make transfers from other appropriations if the plan is adopted.

Your letter says that your office favors the plan in every way, but raises the question of the legality of creating a new fund by means of transfers from other appropriations at this time of the year, there having been no provision whatever made for a sinking fund of this kind in the annual appropriation bill.

We do not think the mere creation of a new fund and the transfer of money into same from other accounts could be regarded as illegal under any circumstances. The expenditure of money therefrom during the current year is the real question before us.

The section of the statute authorizing the transfer of sums of money duly appropriated reads as follows:

“§2a. The City Council of cities, and Board of Trustees in villages having a population of one hundred thousand or more, shall, at any time after the first half of each fiscal year, have power, by a two-thirds vote of all the members of such body, to make transfers within the department, or other separate agency of the municipal government, of sums of money appropriated for one corporate object or purpose to another corporate object or purpose.”

Cities and Villages Act, Art. VII, Sec. 2a.

It was manifestly the intention to permit such transfers from one existing account to another existing account and

to permit expenditures from the augmented account. We have consistently adhered to the belief that the power thus granted should be liberally construed. We have, therefore, repeatedly advised the City Council that the words "within the department" permitted a transfer from one bureau or division to another, and that funds thus secured by means of a transfer could be used for emergency purposes for which no account existed, provided the transfer was within the department. But we have not gone so far as to say that, in the absence of an emergency, such transferred money could be used for a purpose for which no appropriation had been set up. If an appropriation for the purpose is set up somewhere within the department, however small it may be, it would be entirely proper to augment it and expend funds thus transferred.

Again, we would have no hesitation in saying that the new fund could be created and that expenditures could be made for such equipment if all the transfers were made from automobile maintenance accounts, but inasmuch as the accounts drawn on are such as would not contribute to automobile maintenance without a transfer, the question becomes more complex.

After full consideration we have come to the conclusion that, in the absence of any showing to the effect that an emergency exists, the proper thing to do is to create the fund, transfer the money to it as proposed, but make no expenditures therefrom until after January 1, 1923. If there is no immediate necessity for new equipment the whole matter can be adjusted in this way. If, on the other hand, an emergency exists, we would recommend that any expenditure from the fund thus created should be put on the basis of an emergency appropriation.

With respect to our position that the creation of the fund could not in any event be regarded as unlawful, that is not based on the above provision of the statute relating to transfers. Such a course would have been lawful before that statute was passed. Taking a sum from an appropriation for the purpose of holding it for future use does not even require action on the part of the City Council. It simply

amounts to a failure to spend a part of an appropriation, and to set it up in a separate fund amounts to giving it another name. Hence, it has always been regarded as proper for the City Council to make a transfer which does not in effect amount to a new appropriation. (*City of Chicago v. Berger*, 100 Ill. App. 158.) In order to preserve the money in such separate fund for future use care should be taken to set it up in next year's appropriation bill as belonging to the particular fund thus created.

We, therefore, regard the whole plan as entirely feasible and lawful, and such an ordinance as is proposed may legally be put into effect. There are some slight imperfections in the draft presented by the commissioner of public works, and for that reason we have prepared a new draft, which we submit herewith.

We also send herewith the papers mentioned above which you submitted to us along with your letter.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Right of City to Use Patented Electric Light Globe Holder.

November 21, 1922.

HON. GEORGE E. CARLSON, Commissioner of Gas & Electricity.

Dear Sir:

In reply to your request for an opinion concerning the right of the City of Chicago to use a certain kind of globe holder to which Woodliff and May have a patent, we beg to state:

We understand from the correspondence that the globe holders in question were designed by Woodliff and May upon the order of F. H. Snyder, operating engineer, and in accordance with the ideas and suggestions made by him. In other words, that Snyder made the first suggestion for these globe

holders and employed Woodliff and May to perfect the details and make the mechanical construction thereof.

If these facts are correct, Woodliff and May have not, in our opinion, any legal right to the patent for the same. For the law is well settled that where an employer or master workman conceives the plan of an invention and hires somebody else to perfect the details or to make the mechanical construction thereof, even though such latter person may give some valuable suggestions, the invention belongs to the employer and not to the person thus employed.

Agawam Company v. Jordan, 7 Wall. (74 U. S.) 583.

Minerals Separation, Ltd., v. Hyde, 242 U. S. 261, 270.

Eastern Paper Bag Co. v. Continental Paper Bag Co., 142 Fed. 503.

United Shirt & Collar Co. v. Beattie, 149 Fed. 741.

Eastern Dynamite Co. v. Keystone Powder Co., 164 Fed. 47, 55.

In *Agawam Company v. Jordan*, the Supreme Court of the United States said:

“Where the employer has conceived the plan of invention and is engaged in experiments to perfect it, no suggestions from an employe not amounting to a new method of arrangement which in itself is a complete invention, is sufficient to deprive the employer of the exclusive property in the perfected invention.”

In *Minerals Separation, Ltd., v. Hyde*, the Supreme Court of the United States said:

“The claim that the patentees of the patent in suit are not the original discoverers of the process patented because an employe of theirs happened to make the analyses and observations which resulted immediately in the discovery, can not be allowed. The record shows very clearly that the patentees planned the experiments in progress when the discovery was made; that they directed the investigation day by day, conducting them in large part personally and that they interpreted the results.

“*Agawam Company v. Jordan*, 7 Wall. (74 U. S.) 583, 603, rules this claim against the defendant.”

For the reasons above stated, we are of the opinion that

on the facts as stated in your letter and the accompanying report of the operating engineer, F. H. Snyder, Woodliff and May have no right to deprive the city of the use of the invention in question.

Very truly yours,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Objections to Annexation of Part of Township of Niles.

November 22, 1922.

RHODA E. HECHT, 1116 E. Marquette Road, Chicago, Ill.

Dear Madam:

Your letter of protest against the "Annexation of Part of the Township of Niles," as voted upon by the voters of Chicago at the recent election, has been received. We have carefully considered the objections stated, but are unable to find that they are sufficient, at this late date, to authorize the City Council to refuse to consummate the annexation.

The statute under which the proposition was submitted to the voters of Chicago, was Section 1 of an act entitled, "An Act to provide for annexing and excluding territory to and from cities, towns and villages, and to unite towns and villages," approved April 10, 1872, in force July 1, 1872, which reads as follows:

"PETITION TO BE ANNEXED—VOTE OF PEOPLE—ANNEXING.) § 1. That on petition, in writing, signed by a majority of the legal voters, and by a majority of the property owners in any territory contiguous to any city or incorporated village or town, and not embraced within its limits, the City Council or board of trustees of said village, city or town (as the case may be) shall submit to a vote of the people of said city, village or town (as the case may be) at its next regular election or a special election to be called within sixty (60) days after said petition is presented, the question of the annexation of such proposed territory: *Provided, however,* that where the said petition shall be presented within ninety (90) days prior to a regular election no special election shall

be called. In case the question of such annexation shall receive a majority of all the votes cast at said election in favor thereof, the City Council or board of trustees of said city, village or town (as the case may be), shall, within ninety days thereof, by ordinance, annex such territory to such city, village or town, upon filing a copy of such ordinance, with an accurate map of the territory annexed (duly certified by the mayor of the city or president of the board of trustees of the village or town), in the office of the recorder of deeds in the county where the annexed territory is situated, and having the same recorded therein. (As amended by act approved June 27, 1913. In force July 1, 1913. L. 1913, p. 135.)”

We note your objection that the proposition of annexation was not submitted to the voters of the Township of Niles. Under the statute this is not necessary, the Township of Niles not being an incorporated municipality.

We note your further objection that 60 acres, more or less, of the land in question is not owned by any of the persons who signed the petition. You will note from the statute, however, that it is not necessary that *all* the property owners shall sign the petition, but only a *majority* of them.

We note your further objection that none of the persons who signed the petition are residents of the territory. That is probably correct, so far as the *property owners’* petition is concerned, but you have apparently overlooked the fact that, accompanying the same, there was a legal *voters’ petition*, signed by seventeen other persons, who represent themselves to be a majority of the legal voters in said territory.

We note, finally, that you ask that the City Council take steps to nullify the annexation. Under the statute, however, when, as in this case, all the necessary legal steps have been taken, and a majority of the voters of the city have voted for the annexation, the matter is beyond the power of the City Council to rescind, but the City Council *must* then pass the required ordinance perfecting the annexation.

Yours very truly,

CARL J. APPELL,

Approved: Assistant Corporation Counsel.

SAMUEL A. ETTELSON,

Corporation Counsel.

Control of City Council Over Affairs of Board of Education.

November 23, 1922.

HON. EDWARD R. ARMITAGE, Chairman, Committee on Schools,
Fire and Civil Service.

Dear Sir:

Replying to your request for an opinion from the corporation counsel relative to whether the committee on schools, fire and civil service, has any, and if so, to what extent, jurisdiction in or control over the affairs of the Board of Education, we beg to state that the jurisdiction of the City Council—and consequently, also, your committee—in that regard is exceedingly limited. Practically speaking, the only powers the City Council has in that regard are the following:

1. To approve appointments, submitted by the mayor, for members of the Board of Education;
2. To levy school taxes, "upon the demand and under the direction of such Board of Education;"
3. To issue anticipation warrants for school purposes, *whenever requested by the Board of Education;*
4. To sell real estate held in trust for schools, *when so requested by the Board of Education.*

The School Act, as amended by the Act of 1917, makes the Board of Education *a separate and distinct corporation* from the city, although for certain purposes closely related to the same. Section 128 of that act reads in part as follows:

"Each city having a population exceeding 100,000 inhabitants shall constitute one school district which shall maintain a thorough and efficient system of free schools, which shall be under the charge of a board of education, *which shall be a body politic and corporate*, by the name of 'Board of Education of the City of _____,' and by that name may sue and be sued in all courts and places where judicial proceedings are had. The said board of education shall consist of eleven members, to be appointed by the mayor, with the approval of the City Council, three of whom shall be appointed for the term of one year, two of whom for the term of two years, two of whom for the term of three years, two of whom for the term of four years, and two of whom for the term of five years. Thereafter, at the expiration of

the term of any member of said board his successor shall be appointed in like manner; and all persons thus appointed, and their successors, shall hold office for a term of five years from the first day of May of the year in which they are appointed. Any vacancy that may occur in the membership of said board of education shall be filled through appointment by the mayor, with the approval of the City Council for the unexpired term. * * * *No power vested in such board of education, or in any of its officers, agents or employes, shall be exercised by the City Council of such city."*

It will be observed that the manifest purpose of this statute is to make the Board of Education a separate corporation, and as completely independent of the city government as the restrictions of the State Constitution will permit. The members of the Board of Education are to be appointed by the mayor with the approval of the City Council, but when once appointed they are as independent of the mayor and City Council as though they had been elected by the people and can only be removed in the manner that an ordinary elective-statutory officer can be removed, namely, by prosecution for and conviction of malfeasance in office, in a court of law and in management of their office, the control of schools and the expenditure of money therefor, they are not subject to the control of the City Council. The City Council has, indeed, the privilege of voting the tax levy for schools, when so requested by the Board of Education, but the Board of Education has the sole and absolute power of determining how the money is to be spent. Generally speaking, therefore, the City Council has no more control over the Board of Education than it has over the county board or the trustees of The Sanitary District of Chicago.

In the case of *People ex rel. Louis F. Post et al. v. Healy*, 231 Ill. 629, the Supreme Court ordered a writ of mandamus to issue for the reinstatement of certain members of the Board of Education who had been removed by Mayor Busse, the court holding that, although the mayor had the power, with the approval of the City Council, to *appoint* members of the Board of Education, it was wholly beyond his power to *remove* them after they had once been appointed. The court said:

“By the charter of the City of Chicago of the year 1863 the officers of the city included a board of education, which consisted of fifteen school inspectors elected by the Common Council, * * * The Common Council was given power to manage the school funds, school houses and school matters generally, and the board of education only had control subject to the regulations prescribed by the Common Council. There was a general provision authorizing the Common Council, by a vote of two-thirds of all the aldermen authorized to be elected, to remove persons appointed to office by the Common Council or the mayor, with the advice and consent of the Common Council, but no officer could be removed except for cause and after a hearing.”

After holding that the present School Act has changed all that, and made the Board of Education independent of the mayor and City Council, except only as to their appointment and a few other specified incidents, the court continued:

“It (the Cities and Villages Act) contained no provision whatever relating to schools or school officers, the whole subject matter of which was covered by the other act to establish and maintain a system of free schools. The Cities and Villages Act dealt alone with the subject of local municipal government and provided for a mayor and other officers, who should perform the functions of municipal officers. * * * Our conclusion is that the mayor of the City of Chicago has no power to remove from office members of the board of education.”

In the case of *People ex rel. Dibelka et al. v. Reinberg et al.*, 263 Ill. 536, the Supreme Court ordered a writ of *mandamus* to issue for reinstatement of certain members of the Board of Education, whom Mayor Harrison had forced to resign, by requiring their signature to such a paper prior to their appointment. The court in holding that the mayor could not do indirectly what he could not do directly, said:

“It was never contemplated that where the law conferred the power to appoint but not to remove, the power to remove might be conferred by requiring a person, before appointment, to place his resignation in the hands of the appointing power. Such a paper is invalid when signed, and lapse of time can not render it valid.”

As to the general power of the Board of Education, in the

management and control of school affairs, our Supreme Court said, in *Wilson v. Board of Education*, 233 Ill. 464:

“By act of the General Assembly the public schools of the City of Chicago are under the control of the board of education, and it is given *all power and authority* required for the proper management of the schools, with power to enact such ordinances as may be deemed necessary and expedient for such purposes.”

And you will note that Section 128 of the School Act provides:

“No power vested in such board of education, or in any of its officers, agents or employees, shall be exercised by the City Council of such city.”

In *McGurn v. Board of Education*, 133 Ill. 122, our Supreme Court said:

“In cities of class to which Chicago belongs, the entire supervision and control over all public schools of the city is, by the provisions of the School Law, committed to the board of education of the city. *This jurisdiction is necessarily exclusive.*”

In the case of *Brenan v. The People*, 176 Ill. 620, our Supreme Court, in construing the law existing before 1917, held that, for certain purposes, notably the application of the civil service act, the Board of Education might be considered a branch of the city government. Since, however, the court based that opinion largely on the fact that the School Act did not make the Board of Education “a body politic and corporate,” and since the act as amended in 1917, does contain those words, it is questionable how far the Brenan case would apply to the present statute. But anyway, that question has now become immaterial, since the Act of 1917 makes express provision for civil service.

As we stated above, the City Council is invested with authority to levy taxes for school purposes, but its discretion in that regard seems to be limited. Section 135 of the statute says:

“The City Council of said city *shall*, upon the demand and under the direction of such board of education, annually levy all school taxes.”

Finally, lest there be any doubt as to the completeness of the authority of the Board of Education, the statute provides in Section 139:

“The specifications of the powers herein granted are not to be construed as exclusive, but the board of education *shall exercise all the powers that may be requisite or proper* for the maintenance and fullest development of an efficient public school system, not inconsistent with those general provisions of the school law of the state which apply to all school districts.”

In view of the above statute and decisions we are of the opinion that the jurisdiction of the City Council and of your committee relative to the affairs of the Board of Education, is limited to matters concerning the appointment of members of the board, voting taxes and warrants in anticipation thereof, upon the demand of said board, and selling real estate held for school purposes, when so requested by the Board of Education.

Yours very truly,

CARL J. APPELL,

Approved:

Assistant Corporation Counsel.

SAMUEL A. ETTIELSON,

Corporation Counsel.

Prosecution of Plumbers Working in Violation of Law.

November 27, 1922.

CHAIRMAN BOARD OF EXAMINERS OF PLUMBERS.

Gentlemen:

Replying to your request for advice and counsel as to how you should conduct the prosecution of plumbers working in the City of Chicago in violation of the act relative to the licensing of plumbers, in view of a recent decision rendered by Judge Joel C. Fitch, of Albion, Edward County, Illinois, sitting as judge of the Municipal Court of Chicago, holding that the city ordinance on the subject was invalid, we beg to state, that, in our opinion, you should pursue the same line of prosecution as you have heretofore followed, in addition to following up the appeal from Judge Fitch's decision.

We have carefully examined the stenographic report of Judge Fitch's opinion and must say that we are not very strongly impressed with the reasoning of the same, and do not believe that it will either be sustained by the Supreme Court, or even followed by other judges of our local courts. For instance, the opinion states, as one reason for the invalidity of the ordinance, that the *ex officio* chairman of the examining board shall be the *commissioner of health*, while the statute provides that it shall be the chairman of the Board of Health and that the ordinance therefore conflicts with the statute.

In making that statement, however, Judge Fitch did not read the statute correctly, for it provides:

“chairman of the board of health, health officer, or *commissioner of health*, as the case may be.”

Another, and apparently the chief reason assigned by Judge Fitch for the invalidity of the ordinance, is that it covers the same ground as the statute and constitutes a duplication of the same. We do not believe that is a sound objection to the validity of the ordinance. On the contrary, it is, in our opinion, utterly inconsistent with the rulings frequently made by our Supreme Court relative to that principle.

Chicago v. Union Ice Cream Co., 352 Ill. 311.

City of Decatur v. Schlicht, 269 Ill. 181.

Lewison v. Harrison, 282 Ill. 466.

Generally speaking, a decision by a local trial court is *not* considered a binding authority either upon the judges of the same or other courts or upon the public in general. Unless, therefore, Judge Fitch's decision should be affirmed by the Supreme Court—which we do not believe it will—you need not pay much attention to the same.

For the reasons above stated, we would advise you to prosecute violations of the law in question, on the same lines you have hitherto pursued.

Yours very truly,

CARL J. APPELL,

Approved: *Assistant Corporation Counsel.*

SAMUEL A. ETTELSON,

Corporation Counsel.

South Town Chamber of Commerce.

December 5, 1922.

HON. SAMUEL A. ETTELSON, Corporation Counsel.

Dear Sir:

I am returning to you herewith, for your consideration, the correspondence had with Mr. Daniel S. Wentworth in regard to Section 2470 of the Chicago Code, which provides as follows:

Section 2470, Chicago Code, 1911:

"It shall be unlawful for any person, firm or corporation to erect, place or maintain in or upon any street, alley or sidewalk or other public place in the City of Chicago, any fruit stand, lunch stand or lunch wagon, flower stand, bulletin board, trough for feeding horses, or any display boxes, bin, sack, show case, platform or any other arrangement or structure for the display or sale of goods, wares or merchandise, or for the pursuit of any occupation whatsoever, *unless a permit for the same shall be obtained from the commissioner of public works.*"

Mr. Wentworth, in his correspondence, contends that this ordinance is invalid, in so far as it vests in the commissioner of public works discretion to grant permits without specifying any rules or regulations for his guidance in exercising such discretion, but, also contends, that the first section of the ordinance, which simply provides that no such exhibits shall be placed upon the sidewalks, is valid, and that this section will be given effect alone irrespective of whether or not the section, vesting discretion in the commissioner of public works to issue permits, is held valid.

My opinion, in respect to these contentions, is as follows:

The clause in the ordinance which purports to vest the commissioner of public works with the power to grant permits for the obstruction of sidewalks by these exhibits without specifying any rules or regulations by which his discretion is to be guided is undoubtedly invalid.

Thus in the case of *Sheldon v. Hoyne*, 261 Ill. 222, at page 226, the court said as follows:

“The proviso of Section 2 of the act under consideration is not uniform in its operation. It places in the hands of the fire marshal or other designated officer power to say who shall be amenable to the law,—and this, too, without any limitations, directions or fixed rules as to the exercise of his discretion. Even though it is found that conditions are such as to endanger life or property, it still rests in the discretion of an administrative officer to decide whether or not the law shall be enforced,—a discretion which is purely arbitrary and might be exercised in the interest of a favored few. There is no appeal provided from his decision in the matter. The attempt to grant such unlimited power to administrative officers is unlawful. Under the decisions of this court, which are in accord with the authorities in other jurisdictions on this point, our conclusion is that this proviso of said Section 2 of the act must be held unconstitutional and void.”

However, the question which next arises is whether the first part of the ordinance which provides that no such display upon the said premises shall be allowed, should be given effect alone. The rule of law as laid down by our Supreme Court is that if one section of an ordinance is held invalid the other section will be sustained and upheld only if the court can presume from the context of the entire ordinance, and the intention as evidenced by the entire ordinance, that the legislative body which passed the ordinance would have intended such section to be given effect to without the enforcement of the invalid section.

In the same case (*Sheldon v. Hoyne*), the court continued as follows:

“Said proviso being void, does this render the entire act void? This depends upon whether the proviso is so blended with and a part of the rest of the act that it can not be presumed, that the Legislature would have passed the remainder of the act without the proviso. (*People v. Olsen*, 222 Ill. 117; *McAuliffe v. O'Connell*, 258 *id.* 186.) Where that part of the statute which is unconstitutional so limits and qualifies the remaining portion that the latter, when stripped of such unconstitutional provisions, is essentially different in its effect and operation from what it would be were the whole law valid, the whole law should be held invalid. The

remaining portion of the statute thus stripped of its limitations and qualifications can not have the force of law, because it is not an expression of the legislative will. (1 Lewis' Sutherland on Stat. Const., 2d ed., 305.) The elimination of this proviso from the act would cause results not contemplated by the Legislature, for the act would then apply to all classes of cases, notwithstanding that the Legislature undertook to except from its provisions buildings where the flow of gas was comparatively small. It certainly can not be argued from a reading of this entire act that the Legislature intended that all buildings (except private residences) should be equipped with safety devices. A very different result was plainly intended. Under the reasoning of this court in *Matthews v. People*, 202 Ill. 389; *Kellyville Coal Co. v. Harrier*, 207 *id.* 624, and the authorities already cited, it must be held that the void portion of the statute is so blended with the remainder as to render the whole unconstitutional."

This proposition is also enunciated in the case of *Springfield Gas Co. v. Springfield*, 292 Ill. 236, at page 243:

"While it is well settled by adjudications of this and other courts that if different sections of a statute are independent of each other, that which is unconstitutional may be disregarded and valid sections allowed to stand and be in force, yet it is also the inflexible rule that where a portion of an act is valid and a portion invalid, and the court can not say that the Legislature would have passed the act with the void portion eliminated, then the entire act must be held invalid.

"*People v. McBride*, 234 Ill. 146; *Cornell v. People*, 107 *id.* 372; *Hinze v. People*, 92 *id.* 406; *People v. Cooper*, 83 *id.* 585; *Matthews v. People*, 202 *id.* 389; *Kellyville Coal Co. v. Harrier*, 207 *id.* 624."

Applying, then, this canon of construction to the ordinance in question, which is quoted in substance in the correspondence from Wentworth, we are of the opinion that it can not be presumed that the City Council would have intended the one section of the ordinance to operate without the other section. In other words, the connotation of this ordinance does not lead one to believe that the City Council desired to entirely prohibit the placing of any display whatsoever upon the sidewalks. Their intention seems rather to

be to regulate such displays in order that they may not become an unnecessary nuisance or obstruction to pedestrians. But such displays as are so placed as not unreasonably to interfere with the uses of the sidewalk by the public were intended to be allowed.

My opinion, therefore, is that if this ordinance were attacked in court, it would be held invalid *in toto*, and that the court would refuse to hold valid any part of said ordinance.

Should the court so rule, the result would be that there would be no valid ordinance in force in the City of Chicago, regulating or forbidding the placing of exhibits or displays upon the sidewalks,—which would be a result diametrically opposite to that which is desired by Mr. Wentworth.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Licenses for Second-Hand Book Stores.

December 6, 1922.

HON. JOHN A. RICHERT, Chairman of the Finance Committee.
Dear Sir:

This office is in receipt of your communication of the 23d *ultimo*, in which you have requested our opinion as to whether or not dealers in second-hand books are subject to an ordinance entitled, "Dealers in Second-hand Goods: Licenses Required," passed by the City Council on the 10th day of March, 1920, and recorded on page 2137 of the Journal of the Proceedings of the City Council for that date.

Section 1 of said ordinance provides that:

"No person, firm or corporation shall conduct, operate, manage, carry on or engage in the business of dealing in, buying, trading, selling, bartering or exchanging, used articles of merchandise, goods, wares and other commodities of personal property within the city limits of the City of Chicago, without first obtaining a license as hereinafter provided."

Section 2 of said ordinance provides that:

“This ordinance shall not apply to any person, firm, or corporation, who has taken out a second-hand dealer’s license as defined in Section 2240a of The Chicago Code of 1911 as amended.”

Section 2240 of The Chicago Code of 1911, found at page 719 of said code, under Article I, entitled, “Second-hand Dealers,” reads as follows:

“Section 2240. The mayor may grant licenses to such persons as shall produce to him satisfactory evidence of good character, to carry on the business or conduct a second-hand store in the city.”

On the 23d day of December, 1918, the City Council amended Article I aforesaid, pertaining to second-hand stores, by adding to the same Section 2240a, which section is found at page 1347 of the Journal of the Proceedings of the City Council for said date, and which said section reads as follows:

“Section 2240a. A second-hand store is hereby defined to mean a store, shop or other place where second-hand articles of whatever nature, such as jewelry, watches, clocks, diamonds, cutlery, old gold, old silver, old platinum, or any second-hand articles manufactured or composed wholly or in part of gold, silver or platinum; wearing apparel; household goods, furniture, curtains, carpets, rugs, or the like; or second-hand automobiles or motor-driven vehicles, or automobile tires, supplies, parts or accessories, are purchased, sold or exchanged, or kept for sale or exchange.”

On the 10th day of March, 1920, the City Council further amended Section 2240a as amended by eliminating therefrom second-hand articles, other than “jewelry, watches, clocks, diamonds, cutlery, old gold, old silver, old platinum, or any second-hand articles manufactured or composed wholly or in part of gold, silver or platinum and wearing apparel.”

Your attention is directed to the fact that the original Section 2240 above quoted was the only ordinance subsequent to The Code of 1911 pertaining to second-hand stores, and that the scope of said ordinance was broadened by adding Section 2240a on the 23d day of December, 1918, and while somewhat limited by the further amendment of March 10, 1920, Section

2240a subsequent to said latter date was still considerably broader than the original Section 2240. Section 2240a as amended defined a second-hand store and the definition as set out hereinabove and as amended on March 10, 1920, specifically excluded second-hand book stores, for the reason that the same were not included within said Section 2240a as amended.

On the 10th day of March, 1920, the City Council of the City of Chicago further amended Article I aforesaid by passing an ordinance pertaining to the maintenance of a business dealing in "*used articles of merchandise, goods, wares and other commodities of personal property,*" which, in the opinion of this office, is sufficiently broad to include within its scope and purview *an exclusive second-hand book store business*, and particularly so in view of the fact that there seems to have been no other ordinance at that time and subsequent thereto until the ordinance of June 13, 1922, specifically relating to second-hand book stores, other than Section 2240 of Article I aforesaid, pertaining to all "second-hand stores in the city."

We can see no reason why second-hand books, purchased and sold by one conducting an *exclusive* second-hand book store business, should not be included within the phraseology, "*used articles of merchandise, goods, wares and other commodities of personal property,*" and if the city clerk's office has licensed second-hand book store dealers under said ordinance of March 10, 1920, we think it was, and is justified in so doing.

In the opinion of this office, the Eastman case, reported at page 178 of Vol. 79 of the Illinois Supreme Court Reports, does not hold that second-hand books are not to be considered as goods, wares and merchandise, for the reason that in the Eastman case the defendants were not engaged in an *exclusive* second-hand book business, and the court places great emphasis upon that fact. In that case the defendants dealt largely in imported, valuable, rare, old books, as well as other articles, and the court draws the distinction between imported, rare, valuable, old books and a second-hand book store business, stating that rare, valuable, old books are not second-

hand goods, wares and merchandise; but the court does *not* state that books bought and sold by a second-hand book dealer, conducting an exclusively second-hand book store business, can not be classified as goods, wares and merchandise.

Furthermore, the court further holds that the second-hand book business conducted by the defendant in the Eastman case was merely *incidental* to his business and constituted a small part of the stock carried by the defendants.

In other words, the Eastman case is easily differentiated from the instant case and is therefore, in our opinion, not an authority to be cited as inconsistent with the opinion herein rendered. We are in accord with the decision rendered by the Supreme Court in that case.

In our opinion dealers in second-hand books are subject to license under the ordinance of March 10, 1920, page 2137 of the Journal of the Proceedings of the City Council for said date.

Your attention is further directed to the fact that on the 13th day of June, 1922, the City Council passed an ordinance pertaining to second-hand book stores purporting, in all probability, to consolidate the two former second-hand store ordinances into one ordinance. This latter ordinance takes effect January 1, 1923, and is recorded at page 547 of the Journal of the Proceedings of the City Council of that date.

Yours very truly,

J. C. SCOFIELD,

Approved: *Assistant Corporation Counsel.*

SAMUEL A. ETTELSON,

Corporation Counsel.

Interpretation of Act Authorizing Payment of Money to Families of Policemen and Firemen Killed While in the Discharge of Their Duties.

December 7, 1922.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Your letter, requesting an opinion on the powers of the board of trustees having in charge the distribution of the

money provided for the family and dependents of policemen and firemen killed in the performance of their duty, was turned over to the writer for consideration and reply.

You ask two questions. The first is whether money for the use of the family or dependents of a policeman or fireman killed in the performance of his duty can be placed in trust under restrictions.

In reply to this question we direct your attention to Section 3 of the act authorizing the city to make such allowance to the families or dependents of such men. This section provides that upon the death of a policeman or fireman who is killed or fatally injured in the performance of his duty a certificate shall be made out by the city clerk, to which shall be appended the certificate of the attending physician or the chief health officer of the city stating that such death was the result of violence or accident, and that when the same is filed with the treasurer of the city, payment is to be made out of the fund provided, to the executor or administrator of the estate of the deceased. You will observe that there is no discretion vested in anyone, but that the duties to be performed are all ministerial. Under the Cities and Villages Act it is proper to have this certificate prepared and filed by the comptroller, and it would probably be well to follow that procedure because the appropriation is made to the comptroller. (See Art. VII, Sec. 18, Cities and Villages Act.)

The law does not contemplate that the money so provided shall be held in trust, and it can not be placed in trust to be paid out in installments or in any other way, but must be paid to the executor or administrator of the estate in one lump sum.

Your second question is whether the moneys paid to the family or dependents may vary as to amount, depending upon the degree of the dependency of the family of the deceased, if the same be established by general ordinance.

It is entirely within the control of the City Council to determine by general ordinance how much shall be paid, provided the same does not exceed \$5,000.00, and it can also fix, by general ordinance, a schedule which will permit the pay-

ment of a larger sum in cases where there are dependents than in cases where there are none. This can even be amplified to the extent of making a graduated scale, varying according to the number of dependents and the relationship to the deceased. This, however, can be done only by general ordinance, which will be subject to the test of reasonableness. In other words, the City Council can not provide for varying sums without there being some reasonable basis for making a discrimination between the varying degrees of dependency fixed by ordinance.

Whatever general ordinance is passed making such classification as is indicated, will be in effect for all cases that occur while it is in force.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

SAMUEL A. ETTELSON,

Corporation Counsel.

**Status of Claim of FitzSimons & Connell Dredge and
Dock Company.**

December 13, 1922.

HON. ROSS A. WOODHULL, Chairman, Subcommittee of Committee on Finance.

Dear Sir:

Your letter of the 11th instant, in which you ask that an opinion as to the city's standing in the matter of the claim of FitzSimons & Connell Dredge & Dock Company for the work on the Wilson avenue crib and tunnel be given in time for the meeting to be held December 13, 1922, at 2 p. m., was referred to the writer for consideration and reply, after a promise was made to you that such opinion would be forthcoming.

Upon examining the papers submitted to us it was found that the matter was an exceedingly complicated and involved affair.

Believing that you would look for an opinion on the

merits of the controversy, the undersigned went to the chairman of the Committee on Finance and stated that it would be impossible to give an opinion inside of a week. Immediately thereafter, however, Mr. W. C. Asay came to this office and stated that the whole situation had been threshed out in a hearing that extended over approximately sixty days, before the city engineer acting as the representative of the commissioner of public works, and that an award had been made; and that by reason of this the only question that was before us was whether the finding of the commissioner of public works was binding upon the city. Inasmuch as we can pass on this question without going into the merits of the original controversy, we submit the following:

The contract first entered into with FitzSimons & Connell Dredge & Dock Company contained the usual clause under which the commissioner of public works was given the right to finally decide all questions arising as to the proper performance of the contract, and the further right, in case of default, "to adjust the difference of damage or price, if any, which, according to the just and reasonable interpretation of this contract the said contractor should, in the opinion of said commissioner, pay to the City of Chicago."

The paragraph of our form of contracts, which contains the clause referred to, has been the subject of frequent discussion in the courts, and the decisions with respect thereto have not always been alike. But, generally speaking, the courts have held that this clause gives to the commissioner of public works the same authority as the usual building contract gives to an architect where the architect is authorized to act as arbitrator. The consensus of opinion is, in substance, that the authority and discretion vested in the commissioner is not an arbitrary one, but is similar to the sound discretion of a judge who must decide according to the merits of the case, and such discretion may be set aside in case of fraud or manifest abuse of discretion.

By reason of difficulties encountered, a part of the contract of the FitzSimons & Connell Dredge & Dock Company was taken over by the City of Chicago in August, 1918. This was done in pursuance of an order of the City Council that

was passed on August 22, 1918 (Council Journal, p. 1084), under which the commissioner of public works was authorized to enter into an agreement with the FitzSimons & Connell Dredge & Dock Company for the completion of the work. The order of the City Council stated that the city was to take over all contracts for materials and supplies previously entered into by the contractor, and to charge all of the expense incurred by the city, in so assuming the work, against the accumulated reserve on the original contract, and to charge any extra expense which the city might incur, over and above the contract price, against the company in the same manner as if the city had exercised its right to forfeit such contract under its terms.

It will be seen, from an examination of the City Council's order, that the original contract was not abrogated in its entirety, so that we cannot assume that the original contract has been done away with. In fact, when the commissioner of public works entered into a new contract with the company he acted under the advice of the Law Department, which prepared a form for him in which one of the agreements was to the effect that—

“as to all and singular the covenants and agreements of the contract heretofore entered into as aforesaid which are not changed or altered by this agreement in express terms the same shall stand as the agreement between the said contractor and the said city the same as if this agreement had not been entered into.”

Hence, the provision in the original contract under which the commissioner of public works is to determine the damage and adjust it, still stands. In this case, the commissioner adopted the recommendation of the city engineer and made his recommendation to the committee on finance accordingly under date of January 14, 1922. It would seem, further, that the adjustment was acquiesced in and accepted by the claimant. Under the adjustment the commissioner has set off the claims of the city against the claims of the company and allowed the company the reserve which was retained up to the date of the last payment to the company, and, in addition

thereto, the compensation for work performed since the last estimate. The total amount thus allowed is \$39,130.90.

Our opinion in this matter, therefore, does not take into consideration anything except the question of the right of the commissioner of public works to adjust the damage. We have always contended in and out of court that the commissioner has this right under the terms of the city's form of contract, which has been in use many years. We would be stultifying ourselves to hold otherwise in regard to the matter before us.

Therefore, we hold that, in the absence of any showing to the effect that the commissioner acted through fraud or had abused his discretion, his award must be regarded as final.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Disposition of Bids for City Depositaries.

December 14, 1922.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

We are advised by you that you have transmitted the bids of the National and State Banks for interest on city funds to the City Council through the city clerk. This is in pursuance of the provision of the statute which requires you to report these not later than the 15th day of December. The question you raise is whether this delivery to the city clerk is sufficient in view of the fact that there will be no meeting of the City Council before the fifteenth at which this report can be presented.

The statutory provision is to the effect that the comptroller is bound to advertise for bids not later than the first day of December and that they "shall be reported to the City Council for its information and consideration not later than

the fifteenth day of December of each year, to the end that an award or awards may be made upon such bids by the City Council prior to the end of each fiscal year.’’

It will be seen from the language of the statute that the purpose of the requirement, so far as the comptroller is concerned, is to enable the City Council to act in due time. The City Council makes the award, and not the comptroller. The latter performs his duty when he transmits the bids to the proper officer of the council whose duty it is to lay them before that body when it meets.

We are of the opinion, therefore, that you have complied with the statute in sending the bids to the city clerk before December 15th.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Time Limit on Track Elevation Ordinance.

December 15, 1922.

HON. GEORGE M. MAYPOLE, Chairman, Committee on Track Elevation.

Dear Sir:

Replying to your request for an opinion relative to the city's right to cancel track elevation ordinances for which the time limits have expired, we beg to state:

Our Supreme Court has frequently held that a city may, under its police power, pass track elevation ordinances; but that if such an ordinance provides for mutual obligations on the part of the municipality and the railroad company, and is duly accepted by the latter, it becomes a *contract* between the municipality and the company.

Chicago v. P. C. C. & St. L. Ry. Co., 244 Ill. 220.

City of Chicago v. Jackson, 196 Ill. 496.

Accordingly it has been held that where a railroad com-

pany *has fully performed* its obligations under such a track elevation ordinance, the city can not thereafter repudiate its obligations under the same.

Chicago v. P. C. C. & St. L. Ry. Co., supra.

But aside from this proposition, or rather in full conformity therewith, the contracts of a city are governed by the same general principles of law as any other contracts.

“A city or other municipal corporation having the power to make a contract can deal with the contract in the same manner as if it were a natural person, and may in the absence of a statutory limitation upon its powers, or conformity with such limitation, change, modify it, or cancel it in the same manner as it might originally contract. But the modification must be made by officers of the municipality having authority to act in that respect.”

Dillon on Municipal Corporations, (5th ed.) Sec. 820.

The only limitations upon a city's power in that regard, which distinguishes it from private parties, is that it can not release or surrender a valid, *vested* right, without consideration.

Agnew v. Brall, 124 Ill. 312.

Chicago v. P. C. C. & St. L. Ry. Co., 244 Ill. 220.

But it has been held, however, that, an executory right or claim resting solely upon a statute or *ordinance*, and not put into judgment, is not a “*vested*” right or claim, and is therefore not affected by the above rule.

Van Inwagen v. City of Chicago, 61 Ill. 31.

In this case, moreover, the *consideration* which the railroad companies were to receive (exemption from the duty of maintaining safe grade crossings, etc.) has not yet passed to them from the city; which is an additional reason why the city's rights under the ordinances in question must be considered executory, and not “*vested*,” within the meaning of the rule of law above mentioned.

In our opinion, the city has, therefore, the same power to cancel track elevation contracts as it has to cancel an ordinary contract which has been broken or allowed to expire. And

this will apply as well to contracts that have been partially complied with, provided the contract is in its nature severable, which track elevation contract clearly would be, in our opinion.

L. S. & M. S. Ry. Co. v. Richards, 152 Ill. 59.

Keeler v. Clifford, 165 Ill. 544.

In the *L. S. & M. S. Ry. Co. case, supra*, Judge Shope, in delivering the opinion of the court, said:

“It is well settled that where one party repudiates the contract and refuses longer to be bound by it, the injured party has an election to pursue either of three remedies: He may treat the contract as rescinded, and recover upon *quantum meruit* so far as he has performed; or he may keep the contract alive for the benefit of both parties, being at all times ready and able to perform, and at the end of the time specified in the contract for performance, sue and recover under the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing.”

For the reasons above set forth, we are of the opinion that the city has the power, in case it shall through its City Council so elect, to cancel the track elevation ordinances for which the time limits have expired, but which have not been complied with by the railroad companies.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel,

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Payment of Owners of Polling Places.

December 18, 1922.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

We are advised by both the city comptroller and the city treasurer that it is the desire of the Committee on Finance

to authorize the payment of owners of polling places forthwith, but that no appropriation is available for that purpose, and we have been requested to draw the necessary order in order to make such payment possible.

In response to your request, we have prepared an order which we submit herewith authorizing payment out of any money in the city treasury not otherwise appropriated upon warrant of the county judge.

We base our authority for doing this on Section 1 of Article VII of the City Election Act, which provides that salaries of judges and clerks and other necessary expenditures are to be paid "upon the warrant of such county judge, out of any money in the city treasury not otherwise appropriated."

Several years ago a similar question arose and the election commissioners filed a petition for mandamus before the late Judge Walker to compel payment, although no appropriation had been made. Judge Walker held that the city was bound to pay, even though no appropriation had been made, and entered an order accordingly.

We, therefore, see no objection to the passage of such an order as we submit herewith.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Vacation of Alley.

December 18, 1922.

HON. JAMES BOWLER, Chairman, Committee on Railroads, Industries and Compensation.

Dear Sir:

We are in receipt of your request for an opinion as to the advisability of recommending for passage an ordinance vacating the 16-foot alley extending north and south through Block 5 in the Superior Court partition of the west one-half of the northwest quarter of Section 4, Township 38 North,

Range 14, East of the 3rd Principal Meridian, and fixing the compensation at the sum of \$500. Block 5, as above mentioned, lies between Emerald avenue on the east, Halsted street on the west, 41st street on the south and the Union Stock Yards and Transit Company's railroad right of way on the north. From West 41st street to the right of way of the Union Stock Yards and Transit Company is about 400 feet, and this is the entire length of the alley in question.

From an examination of the record it appears that Block 5 was subdivided into lots and the above mentioned alley by Henry A. Cram in 1886. The plat of the subdivision is recorded in Book 22 of Plats on page 17.

From an examination of the plat it appears that the 16-foot strip running north and south through Block 5 is not designated on the plat as an alley, as required by statute in order to constitute a statutory dedication of land for use as a public alley, but that the strip is entirely blank with nothing thereon to indicate its purpose.

The attorneys for the Independent Packing Company contend that the failure to designate this 16-foot strip as an alley on the plat clearly shows that the strip in question was intended as a private alley and not as a public one.

It is our opinion, however, that if we were able to prove that the alley in question is available and necessary for public use, the courts would hold that the Independent Packing Company were estopped from claiming the said strip to be a private alley in view of the fact that at one time they entered into a lease with the City of Chicago for its use and occupation.

From an examination of the abstract of title to Block 5 it appears that the Independent Packing Company is the owner of all the lots in Block 5, and that the property owned by the Independent Packing Company abuts on all sides of the alley in question. If the alley in question ever was available for public use, which is doubtful, it is certainly not available now but it is impossible for the public to use it for any purpose.

At the end of a long drawn out lawsuit the court might decide that the alley in question is a public alley, and it

might decide that, in view of the failure to designate it as such on the plat, in accordance with the provisions of the statute, it is a private alley. If we won, the alley would not be available for public use on account of the fact that the Independent Packing Company owns all the abutting property.

After giving the matter careful consideration it is our opinion that the recommendation of your committee for the passage of an ordinance vacating the said alley and fixing the compensation therefor at \$500 is an equitable adjustment of the controversy existing between the Independent Packing Company and the city over the title to the said strip, and we concur in the recommendation of your committee.

Yours truly,

JAMES W. BREEN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Garages of Yellow Cab Co.

December 19, 1922.

BARRETT & BARRETT, Attorneys at Law, 140 N. Dearborn St.,
Chicago, Illinois.

Gentlemen:

We are in receipt of your letter of the 7th instant, in which you state that the Fire Prevention Bureau is endeavoring to collect an automobile filling station license from the Yellow Cab Company for each of its garages, in addition to the garage license, and that they base that interpretation upon an opinion from the corporation counsel under date of September 12, 1922. We do not find that that opinion contained any ruling, one way or the other, on the subject, and whether this additional license fee should be required depends upon the language of the ordinance.

Section 283 of the new code (which goes into effect December 21, 1922) reads as follows;

“283. FILLING STATION DEFINED. The words ‘filling station’ as used in this article shall be held to mean and are hereby defined as meaning any building, structure, premises, enclosure or other place within the city where a container or containers, tank or tanks, either portable or stationary, and containing ether, carbon, bisulphate, gasoline, naptha, benzole, hydro-carbon, (gas drops) liquified petroleum, gas, acetone, kerosene, turpentine, or other inflammable liquids, having a flash point below 165 degrees Fahrenheit, are kept or located *for the purpose of selling, offering for sale, or distributing any such liquids* from such containers, tank or tanks; provided, however, that the provisions of this article shall not apply to any place where such inflammable liquids are kept or sold for medicinal purposes only.”

We think it will be agreed that the controversy in this case revolves around the meaning of the words,

“for the purpose of selling, offering for sale or distributing any such liquids.”

As we understand the Yellow Cab Company merely supplies oil to its own cabs, it can not, in our opinion, be said that it *sells* or *offers for sale* any oil, even though it may be true that, for bookkeeping purposes, the amount of gasoline used by each driver is charged to his account. But this, as we understand, is merely for the purpose of computing his commission on the net profits of the portion of the business done by him for the company, and we do not therefore believe that any court would construe that to be a sale.

There remains the question whether the Yellow Cab Company keeps oil for the purpose of “*distributing*” the same. The company, as we understand, does not distribute any oil to any other parties or purchasers, but merely distributes it from its own tanks to its own automobiles. That is not, in our opinion, such a distribution as the ordinance contemplates. Had the word “*distributing*” been used alone, it might, no doubt, have been susceptible of that meaning, but since it follows the words “*selling*” and “*offering for sale*,” it must, we believe, under the rule of *ejusdem generis*, be limited in meaning to a *distribution in the nature of a sale*.

In *City of Chicago v. Rose*, 257 Ill. 76, the court said:

“It has been repeatedly held by this and other courts, that where general words follow particular and specific words in a statute, the general words must be construed to include *only things of the same kind* as those indicated by the particular and specific words.”

To the same effect are:

People v. Melville, 265 Ill. 176.

Metropolitan El. Ry. Co. v. Chicago, 261 Ill. 624.

Gundling v. City of Chicago, 176 Ill. 340.

For the reasons above set forth we are of the opinion that the Yellow Cab Company is not required to take out any filling station licenses. As to its liability for garage licenses and its duty to take out permits for the installation of the oil tanks in the first place, we do not understand there is any controversy.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Status of Litigation Over Five-Cent Fare.

December 21, 1922.

MR. HOMER P. VANDERBLUE, Professor of Business Economics,
Harvard University, Cambridge, Massachusetts.

Dear Sir:

Your communication of recent date addressed to Hon. William Hale Thompson, Mayor of the City of Chicago, relative to the City of Chicago's case on its contract with the street railway companies and for a five cent fare, has been referred to this department for attention.

The City of Chicago, under power delegated to it by the Legislature, enacted certain ordinances in 1907 and 1908 generally known as settlement ordinances, inasmuch as they followed an adjudication by the United States Supreme Court against the companies then operating in the City of Chicago

and claiming to have ninety-nine year rights in the streets of Chicago. (*Blair v. City of Chicago*, 200 U. S. 400.) These ordinances contained many provisions, particularly one providing for the purchase of the properties by the city at any time during the term of the ordinances. They also provided for the rate of fare that should be charged, the amounts of money that should be set aside for depreciation, insurance, repairs and renewals, and the rate of return on investment that should be received by the companies. These ordinances further provided for the rehabilitation of the entire system which was then composed of cable lines and various electric lines. The purpose was to make a standard or uniform system with ultimate through-routing from one part of the city to another at a uniform rate of fare, *viz.*, five cents per adult passenger. These ordinances were made by the city in its proprietary capacity and were contracts in their nature and by virtue of their acceptance by the companies.

The companies adhered to the terms of the ordinances, except in the matter of adequate service, until 1915, or shortly after the enactment by the State Legislature of the Illinois Public Utilities Law. On the question of service, the Public Utilities Commission, in the exercise of the authority granted it by the State Legislature, but contrary to the terms and provisions of the settlement ordinances, entered an order on September 29, 1915, modifying, changing and annulling in part, the terms of the contracts. The city and the companies alike joined in protesting against such change and modification and injunctions were accordingly sought. The decision of the lower court was that such changes or modifications made by order of the commission were made by an administrative body in the exercise of the state's police power, and that such exercise was not a violation of contracts, inasmuch as the contracts were at least presumed to have been made with a view of their subsequent change, whenever the state saw fit to exercise its police power. The result in this matter is indicated in the case of *City of Chicago v. O'Connell*, 278 Ill. 591; see also *City of Chicago v. Dempsey*, 250 U. S. 651. The provisions relating to rates of fare remained in

force and without change until August 8, 1919, when the Illinois Public Utilities Commission, at the instance and request of the companies, changed and modified (by increasing the rate of fare) these provisions. The City of Chicago contested this matter bitterly as the five cent fare was the keystone of the entire ordinance contracts, and we have had considerable litigation resulting therefrom.

The appeal taken to the State Supreme Court following such action by the Illinois Public Utilities Commission, now known as the Illinois Commerce Commission, is reported in 292 Illinois at page 190, in the case entitled *Chicago Railways Company v. City of Chicago*. Adhering to its former decisions, our Supreme Court held that the commission had power and authority to change the rate of fare. A writ of error from the Supreme Court of the United States to the Supreme Court of Illinois in this case was dismissed for want of jurisdiction on November 21, 1921.

We have pending in the Circuit Court of Cook County a bill in chancery brought by the city for the purpose of seeking redress against the action of the companies in obtaining the changes in their contracts. The bill sets up the various breaches and the city's election to treat the breaches as a repudiation of the contracts, and asks the court to declare and decree a cancellation and abrogation of the contracts because of the breach and repudiation of them by the companies. There is other litigation pending, but in the brief statement which we have made above, we believe that we have answered your question.

If there is any other information relative to the City of Chicago's street car litigation, we shall be glad to furnish it to you.

Respectfully yours,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Loss of Fur Coat at Lawndale Hospital.

December 28, 1922.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.
Dear Sir:

We are in receipt of your communication of the 20th instant, relative to the claim of Lillian Daring, 2121 S. Ashland avenue, for the loss of a fur coat, valued at \$135, which you say was stolen by an inmate of the Lawndale Hospital, while the claimant was a patient there and after she had, in accordance with the rules of the institution, turned over said coat, together with other wearing apparel, to the matron for safe keeping, to be retained in a locker until her release. We note your request for advice as to how the matter should be handled.

In the first place, we would advise that when personal property of inmates is thus received for safe keeping, it be kept in a sufficiently safe place to prevent it being stolen by other inmates of the institution. For while the representatives of the Health Department are not strictly *insurers* of such articles against theft, they are, at any rate, required to exercise ordinary care to prevent them from being stolen, and what constitutes ordinary care under all the circumstances is a question of fact for the jury, in case suit is brought.

Were it simply a question of whether a *tort* or wrongful act had been committed by an employe of the Health Department, we should have no hesitancy in saying that the city was not liable for the same, for the law is well settled that a city is not liable for the negligence of its employes in the conduct of a municipal hospital, or in the enforcement of any other police regulations.

Tellefson v. City of Ottawa, 228 Ill. 134.

Culver v. City of Streator, 130 Ill. 238.

City of Richmond v. Long, 17 Gratt. 375.

Johnston v. City of Chicago, 258 Ill. 494.

But while there may have been an element of negligence in this case, the claim is not, as we understand it, based upon a *tort*, but rather upon an implied *contract* of bailment, *i. e.*,

a contract for the safe keeping and re-delivery of the coat. And, needless to say, the city can not escape liability on its contracts, duly entered into by its representatives.

If in this case the hospital authorities had permitted Miss Daring to retain the custody of her coat, and it then had been stolen, by an employe of the hospital, or otherwise, that would have been a clear case of a *tort*, for which Miss Daring might, indeed, proceed against the thief, but for which she could not hold the city liable. But here, the matron of the hospital, under instructions from the Board of Health, and accordingly as a representative of the city, entered into an implied *contract* with Miss Daring to safely keep the coat for her and to re-deliver it to her upon her discharge from the hospital. That, in our opinion, amounted to an implied contract of bailment.

There might be question as to the authority of the hospital officials to make such a contract, but since it was admittedly done under instructions from the Department of Health, which undoubtedly possesses the power to make such regulations as are necessary for the conduct of the hospital (and we assume that they deem the regulation in question necessary to a proper control of the patients), we are of the opinion that the courts would hold the city estopped to deny the validity of the contract, after it has been fully performed by the other party thereto.

While it is true that the bailee is, under such circumstances, only bound to use ordinary care, yet what constitutes ordinary care has always been held to be a question of fact for the jury, from which you will understand that suits on claims like this are apt to be dangerous to the city. We are also of the opinion that the burden of proof in this case would be upon the city to show that the hospital officials had *not* been negligent.

Bennett v. O'Brien, 37 Ill. 250.

Cumins v. Wood, 44 Ill. 416.

Frankhouser v. Wagner, 62 Ill. 59.

Schafer v. Washington Safety Deposit Co., 281 Ill. 43.

In the recent case of *Schafer v. Washington Safe Deposit Co.*, 281 Ill. 43, our Supreme Court said:

“Where a bailee receives property and fails to return it the presumption arises that the loss was due to his negligence, and the law imposes on him the burden of showing that he exercised the degree of care required by the nature of the bailment.”

We might add that the liability in this case is different from, for instance, that of the custodian of lost and stolen property, of the Police Department, who takes charge of property, the ownership of which is unknown, for there the contractual element is lacking.

Our conclusions are therefore, that the circumstances under which the hospital officials received the fur coat in question constituted an implied contract of bailment; that it was the duty of the hospital officials to keep the coat safely and use due care that the same would not be stolen or otherwise lost; that the burden of proof in case of suit would be upon the city to show that the loss did not occur through the negligence of its agents or servants; that precaution ought therefore be taken to prevent similar losses from occurring in the future.

Very truly yours,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Award of Contract to Bidder Whose Bid Arrived After Advertised Time.

January 2, 1923.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.
Dear Sir:

We are in receipt of your communication of today, stating that, in the matter of printing the Triennial Report for the Department of Health, objection has been made, by one of the disappointed bidders, to the awarding of the contract to

the lowest bidder on the alleged ground that his bid was not actually received until 11:08 a. m., while the advertisement stated that "sealed bids will be received by the Commissioner of Health until 11:00 a. m., January 2, 1923," although none of the bids were opened until a few minutes after the last bid had been received.

Several legal grounds might be mentioned why the slight discrepancy between "11:00 a. m." and "11:08 a. m." might be disregarded, any one of which would be sufficient. In the first place, the *unit of time* in law is ordinarily one day, and the law will never take account of a fraction of a day unless some practical consequences can be shown, that is to say, unless in addition to mere lapse of time there has been some actual change in the situation of the parties or the subject matter (as would have been the case here if the bids had already been opened, so that the last bidder would have, or conceivably might have, known what the other bids were when he presented his).

Levy v. Chicago Nat. Bank, 158 Ill. 88.

McGovern v. Union Mut. Life Ins. Co., 109 Ill. 151.

Houfer v. Schultze, 2 Ill. App. 196.

As the difference in time was so slight, we might also apply the familiar principle that the law does not concern itself with inconsequential trifles. (*De minimis non curat lex.*)

Furthermore, the provision in the advertisement that you would receive bids up to 11 a. m. was not a statutory regulation, nor a regulation fixed by ordinance, but one which you had fixed yourself for your own convenience, and such regulations need not be complied with with the same technical strictness as positive rules of law, especially as regards minor details.

People v. Kent, 160 Ill. 655.

So long, therefore, as none of the bids had actually been opened, we cannot see how anybody can claim any legal damage from a few minutes delay in declaring the bidding closed and in proceeding to open the bids.

Furthermore, whether it was actually 11:08 o'clock or merely 11 o'clock, involves such a slight difference in time,

that it might amount to a question of opinion as to the accuracy of different clocks or watches, which we do not believe that any court would consider, in the absence of any official action or declaration by yourself refusing to receive any further bids.

Finally, there is the rule of law that, for many purposes, the expression "11 o'clock" means the whole hour between 11 and 12 o'clock. In the case of *McGovern v. Union Mutual Life Ins. Co.*, 109 Ill. 151, 155, our Supreme Court said:

"We now come to the question whether the sale occurred at the time appointed in the notice. The advertisement of the sale gave notice that the property would be sold 'at the hour of eleven o'clock,' but the sale did not occur until between half-past eleven and twelve o'clock, and it is claimed that under the notice the trustee was bound to sell the property at eleven o'clock sharp. We do not concur in that view. The law does not recognize fractions of an hour or fractions of a day, and when a notice says that a sale of land will be made at the hour of eleven o'clock, the practical common sense of the language used is, that the sale will be made during the hour of eleven, or between eleven and twelve o'clock. This is upon the ground that eleven o'clock means from eleven until twelve—in other words, it is eleven o'clock from eleven to twelve."

We are of the opinion, therefore, that the contract ought to be awarded to the lowest responsible bidder.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,
Acting Corporation Counsel.

Personal Property Left Unclaimed at Municipal Hospital.

January 6, 1923.

HON. HERMAN N. BUNDESEN, M. D. Commissioner of Health.
Dear Sir:

Replying to your request for an opinion relative to what should be done with personal property left unclaimed at the

Municipal Contagious Disease Hospital by former patients, we beg to state that, in our opinion, it may be treated as property *abandoned* by its owners and that after due notice to such former patients (given them personally or by mail, if their addresses are known; otherwise by publication), it may be appropriated by officials of the Health Department and disposed of in such manner as they see fit.

While there is a statute in this state relative to *Estrays and Lost Property* (Ill. Rev. Stat., Chap. 50) yet that statute does not, in our opinion, apply to this kind of property, since the same has neither *strayed* from the owners (like domestic animals) nor been *lost* by them, but has been *knowingly*, and presumably intentionally, abandoned by them.

Neither do we believe that the ordinance relative to lost or stolen property applies; for that ordinance, by its terms applies only to property *taken by the police*. Moreover the property in question is neither lost nor stolen.

In our opinion, therefore, this property is governed by the elementary principles of the common law. In 1 Corpus Juris 9, the rule is stated thus:

“Title to personal property may be lost by abandonment.”

and again (1 C. J. 13):

“An abandonment divests a title as fully as a conveyance and operates from the time of the act of abandonment. Where the owner of a thing abandons it, one who thereafter gains possession becomes the owner, and the former owner cannot maintain trover for it.”

In the case of *Foster v. Fidelity Safe Deposit Co.*, 162 Mo. App. 165, the court, in discussing the difference between property which is *lost* and property which is *abandoned* by the owner, said:

“Property may be separated from the owner by being *abandoned*, or lost or mislaid. In the first instance it goes back into a state of nature, or, as is most commonly expressed, it returns to the common mass and *belongs to the first finder, occupier or taker*. In the second instance, to be lost, it must have been unintentionally or involuntarily parted with, in which case it is also an object which may be found and the finder is entitled to the possession *against every one but the true owner*.”

In *Wyman v. Hurlburt*, 12 Ohio 81, the court said:

“When the jury find the vessel and money were *abandoned by the owner*, we suppose the intent to be understood that all hope, expectation and intention to recover the property were utterly and entirely relinquished; and such the judges who tried the case believe was the evidence given on the trial; and in the case of property thus derelict and *abandoned*, either on the high seas or anywhere else, *it belongs to the first finder who reduces it to possession.*”

In *Eads v. Brazelton*, 22 Ark. 499, the court said:

“When things that become property from being appropriated are the property of nobody, are in the state of negative community, the first finder may reduce them to possession, which is a good claim, and under the name of title by occupancy is regarded as the foundation of all property. 2 *Blk's Com.* 3, 258; 1 *Bouv. Am. L.* 194, No. 491; *Pothier Droit de Propriete*, Nos. 20, 21; *La. Civil Code*, Art. 3375, 3376.

Hence, wild animals, that are not property in the natural condition, may be captured, will belong to the first taker by occupancy, and will so belong while in the keeping of the taker, or person claiming under him, or while in domestication. 2 *Kent.* 348; *Coop. Just. Lib. II Tit. I, Sec. 12*; 1 *Bouv. Am. L.* 194, No. 492; *La Civil Code*, Art. 3379.

So, the finder of things that have never been appropriated, or that have been abandoned by a former occupant, may take them into his possession as his own property; and the finder of any thing casually lost is its rightful occupant against all but the real owner.”

In the case of *M'Goon v. Ankerry*, 11 Ill. 558, our own Supreme Court, in discussing the ownership of a quantity of slag that had been abandoned by its owner, said:

“It is undoubtedly true that if those who made the slag, considered it entirely worthless, and cast it away with the intention of abandoning it, they thereby divested themselves of their title to it, and could have no more cause to complain when it was taken by another than if they had never owned it, unless they reclaimed it, without violating the rights of others, and before any other person had become possessed of it or had appropriated it.”

In the case of *Kansas City etc., R. Co. v. Wagand*, 134 Ala. 388, which was an action for damages against a railroad company for killing a mule which the owner had previously abandoned, the court said:

“The owner of personal property may divest himself of title by abandonment; and after doing so he cannot maintain ownership. *Wyman v. Hurlburt*, 12 Ohio St. 81; 40 Am. Dec. 461; 1 Am. & Eng. Ency. Law 2. This can be only where the owner has intended to relinquish his property right; and where the evidence on the point is conflicting or leaves room for contrary inferences, the question of abandonment *vel non* is for the jury. Here, however, the evidence is without conflict and the plaintiff’s declarations and conduct above referred to, lead solely to the conclusion that the plaintiff both entertained and carried out the intention of abandoning his property in the animal.”

In *Farmers Canal Co. v. Frank*, 72 Nebr. 136, 155, the court said:

“Whether an act of a party constitutes an abandonment of property previously occupied by him depends entirely upon the intention with which it is done. An abandonment of property held by possessory title takes place instantly when the occupant deserts it without any intention of ever reclaiming it for himself, and careless of what may thereafter become of it. A single act may be of such character, and done in such manner, and under such circumstances, that an intention to abandon may be inferred from it.”

In *Davis v. Butler*, 6 Cal. 510, the Supreme Court of California said:

“The inference of abandonment may arise from a single act, as well as from a series of acts continued through a long space of time. It is a fact to be determined from the particular circumstances of the case. * * *

“The abandonment determines the right of the party from the day of the act, and the property is to him as though he had never owned or occupied it.”

In *Gluckauf v. Reed*, 22 Cal. 468, the court said:

“When Eaton abandoned the possession he ceased to have any right, title or interest in the property, and

the defendant or any other person had the right to enter and take possession, and such possession would vest in him the right of possession as against Eaton or any one claiming under him.”

Other cases to the same effect are :

Haslem v. Lockwood, 37 Conn. 501.

Nelson v. Blinn, 197 Mass. 279.

Graham v. Purcell, 110 N. Y. Supp. 813.

Somers v. National Bank, 152 Wis. 210.

Miller v. Hamley, 31 Colo. 495.

Harkrader v. Carroll, 76 Fed. 474.

Kee & Chapell Dairy Co. v. Pennsylvania Co., 214 Ill. App. 1; affirmed, 291 Ill. 248.

In this case we understand the property has been left at the hospital by former patients, who not only failed to take the same with them when they left, but have not afterwards, though a reasonable time has elapsed, made any efforts to reclaim the same. This, in our opinion, raises a presumption that they have intentionally *abandoned* the same and are willing that the hospital authorities may dispose of the same as they see fit.

But in order to fully establish the fact of such abandonment we believe that the officials of the hospital, or of the Health Department, should before appropriating the property, serve *notice* upon the former owners, notifying them to claim and remove said property by a certain day, to be specified in such notice, in default whereof the property will be regarded as having been abandoned by its owners, and will be disposed of accordingly. Such notice may be served in any reasonable manner, but should be served upon them personally, if they can be found; otherwise by publication. While there is no precise statutory regulation covering the manner of such publication, we believe that a notice published substantially in the manner prescribed for notices to non-resident defendants in pending law suits would be regarded as reasonable notice. That is to say, the notice should be published at least once a week for three successive weeks in some secular newspaper of general circulation in the county and a copy

of such notice should be mailed to the party's last known address.

If after such notice or publication the former owners fail to reclaim the property, we are of the opinion that the Health Department may take possession of the property as property abandoned by its owner, and make such disposition thereof as in their opinion would best serve the public interests.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Status of McKeever's Addition to Stony Island Heights.

January 8, 1923.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

Replying to your request for an opinion relative to the status of what has heretofore been platted as "McKeever's Addition to Stony Island Heights," we respectfully submit the following:

We find from the documents you submitted, as well as the records referred to, that on January 29, 1891, James L. McKeever and Wm. T. McKeever, being the sole owners of the premises in question, subdivided and filed for record a plat of the same, designating the same as follows:

"McKeever's Addition to Stony Island Heights, being a Subdivision of Lots 12, 13, 15 and 16 in 'Partition by Owners' of the west half of the northwest quarter of Section One, Township Thirty-seven North, Range Fourteen East of the Third Principal Meridian, in the County of Cook and State of Illinois."

This plat was, at the time it was filed, duly approved by H. J. Jones, Examiner of Subdivisions.

A few months later, on July 9, 1891, before any lots, part of portion of said subdivision had been sold, the said

owners duly executed and filed for record a deed of vacation vacating said subdivision in its entirety.

Under the statute, in force at that time, the owners had a perfect right to vacate the plat in that manner. The statute read as follows:

“Any such plat may be vacated by the owner of the premises at any time before the sale of any lot therein, by a written instrument declaring the same to be vacated, executed, acknowledged or proved, and recorded in like manner as deeds to lands; which declaration being duly recorded, shall operate to destroy the force and effect of the recording of the plat so vacated, and to divest all public rights in the streets, alleys and public grounds, and all dedications laid out or described in such plat. When lots have been sold, the plat may be vacated in the manner herein provided by all the owners of lots in such plat joining in the execution of such writing.”

We have carefully examined the deed of vacation above mentioned and find that it duly conforms with the provisions of this statute.

This statute was amended in 1917, so as to require acceptance of such deed of vacation by the City Council before the same shall become effective, but the amendment can of course not affect the document here in question, which was executed more than 25 years previously. Our Supreme Court, in construing the original statute had expressly stated:

“This does not require the concurrence or joint action of the city council of cities, or board of trustees of villages, with the owner of the premises, but allows him, of his own volition alone, subject to the restrictions and qualifications mentioned, to vacate the plat, or part of plat, by his deed declaring that fact. Chapter 145 of the same statute has no reference to such vacations, but relates exclusively to the vacation of streets and alleys by municipal authorities.”

Littler v. City of Lincoln, 106 Ill. 353, 364.

We note your statement that no improvements had been made by the city in the subdivision after the dedication and before the vacation thereof, nor, indeed, since the last mentioned event. That may be an equitable reason why the vacation should not be questioned, but technically it would have

made no difference, for our Supreme Court has repeatedly held, that the owners of a plat may vacate it even after such improvements.

In *Illinois Western Electric Co. v. Town of Cicero*, 282 Ill. 468, the court said:

“Appellant insists that the city had accepted the dedication of the streets shown by the plat, and that the public had secured rights therein before the attempted vacation and that these rights of the public could not be divested. Section 6 answers this by expressly stating that the vacation of the plat does ‘divest all public rights in streets.’ Only rights once vested can be divested. Nothing could be plainer than this provision, and no argument can make it plainer. There is no need or occasion for construction. * * *

“Appellant insists the effect and meaning we have given Section 6 is contrary to public policy, because it would permit the removal of improvements now in said street. As we have before said, the language of the statute is not ambiguous, and is not open to construction. In plain terms, it says the instrument of vacation shall operate to destroy the force and effect of the plat ‘and to divest all public rights in the streets, alleys and public grounds, and all dedications laid out or described in such plat.’ A court cannot say the Legislature did not mean what in plain language it said was its intention. It is not claimed giving Section 6 the effect we have given it would violate any constitutional provision. If the enforcement of the statute results in evil consequences, the remedy must be in the Legislature.”

For the reasons above set forth, we are of the opinion that “McKeever’s Addition to Stony Island Heights” was duly vacated in 1891 shortly after its dedication, and that such description should not, therefore, be used by the Board of Local Improvements or any other agency of the city, in describing the property in question.

We do not wish to be understood, however, as expressing any opinion as to the status of 90th street or any other of the streets shown upon the plat. For although the plat was vacated 32 years ago, it may be that some of the streets, running across the tract, have since the date of the vacation been used by the public in such manner and for such length of time

(15 years) as to amount to a common law dedication of the same. We have not at present any facts before us from which we can determine that question.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Liability of Contractor for Increased Cost of Material
Purchased by the City.**

January 9, 1923.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.
Attention of Thomas H. Byrne, Superintendent of
Streets.

Dear Sir:

Replying to your request for an opinion relative to the city's claim against the Howard Material Company on account of the difference in price by reason of the fact that the city was required to purchase certain material in the open market, when the Howard Material Company failed to comply with its contract within the time specified, we beg to state.

That in the first place the specifications upon which the Howard Material Company made their bid specifically provided as follows:

“Shall the contractor fail to deliver material of the quality required by these specifications within the time limit herein specified, the commissioner of public works may suspend the contract at any time or declare the same forfeited or relet the same, or he may purchase the material in an open market and deduct the difference between the cost of such material and the price in the contractor's proposal for any moneys that may then be due or may become due and payable to the contractor, and if there shall not be a sufficient amount retained by the said contractor then the amount to be paid the city in consequence of such failure to furnish and deliver ac-

ording to the specification, shall be a just claim against said contractor to be recovered at law in the name of the city in any court of competent jurisdiction."

In the second place the contract which was thereafter entered into provided as follows:

"The said City of Chicago hereby reserves to the said commissioner of public works the right finally to decide all questions arising as to the proper performance of this contract, and in case of failure by the party of the first part to comply with this contract in any manner, then to declare the same forfeited either as to a portion or the whole thereof and to relet the same with or without further advertisement.

* * * * *

"It is further understood and agreed, that for any amount of damage or price determined by the said commissioner of public works to be paid to the city by said contractor, for any such default or for any moneys paid out by said city in consequence of any such default, there shall be applied in payment thereof a like amount of any money that may be due and owing to said contractor under or on account of this contract, so far as there may be any such money, and the same shall be sufficient; if there shall not be a sufficient amount retained from the said contractor then the amount to be paid to the city in consequence of such default shall be a just claim against said contractor to be recovered at law in the name of the city in any court of competent jurisdiction."

Under the provisions of the specifications and the contract we are of the opinion that the commissioner of public works clearly had the right to purchase material in the open market if the contractor failed to deliver on time and to charge the difference in price to the contractor.

We do not understand that the Howard Material Company questions this interpretation of the contract. The ground on which they seek to escape this liability is thus stated by them:

"All our commercial contracts are subject to strikes, accidents, shortage of cars and other causes beyond our control, and the City of Chicago should not in our judgment claim an exemption from this commercial custom. We trust that you will cancel this claim for the above reasons."

That, however, is not, in our opinion, any legal ground for exempting them from the claim. If they wish to rely on this custom of theirs they should have embodied it in the contract, which they did not do. Even if the custom is common with them it is not a custom of such universal application as to make it equivalent to a rule of law. In discussing what kind of customs may be read into contracts our Supreme Court said in the case of *C., C. & St. L. Ry. Co. v. Jenkins*, 174 Ill. 398, at page 407:

“A custom or usage, to be binding, must be so uniform, long established and generally acquiesced in, and so well known, as to induce the belief that parties contracted with reference to it, if nothing is stated to the contrary, and that the failure to conform to it would be an exception. (*Bissell v. Ryan*, 23 Ill. 517; *Wilson v. Bauman*, 80 *id.* 493.) A custom must be general and uniform. It must be certain, reasonable and sufficiently ancient to afford the presumption that it is generally known (*Turner v. Dawson*, 50 Ill. 85), and must not be in opposition to any principle of general policy, nor inconsistent with the terms of the agreement between the parties or against the established principles of law. Besides this, it must be generally known and established, and so well settled and so uniformly acted upon as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to it and in conformity with it. (*Turner v. Dawson*, *supra*; *Packard v. Van Schoick*, 58 Ill. 79; *Papin v. Goodrich*, 103 *id.* 86.) If it should appear, therefore, from the evidence, as it does in this case, that the foregoing elements are not established, and only a few isolated instances are shown to prove a usage or custom, the court, as a matter of law, should have held that a usage or custom was not thereby established. The evidence must clearly show the rule as above stated, and that a failure to conform with such custom would be unusual.”

In the present case it is clear that no such universal custom was involved, and therefore we are unable to find any legal grounds upon which the Howard Material Company can be exempted from the city's claim.

Yours very truly,

CARL J. APPELL,

Approved: *Assistant Corporation Counsel,*
SAMUEL A. ETTTELSON,
Corporation Counsel,

Suspension of Pension of Widow of Fireman.

January 9, 1923.

TO THE BOARD OF TRUSTEES OF THE FIREMEN'S PENSION FUND.
Gentlemen :

I beg leave to acknowledge the receipt of your communication of December 5, 1922, requesting us to advise you whether or not, under the law, you are required to temporarily suspend the pension heretofore granted, to Agnes Burke, widow of John Burke, in accordance with Section 9 of the Pension Act, on account of the fact that she obtained a judgment against the City of Chicago under the Workmen's Compensation Act.

In reply, I beg to advise you that your board is in error in assuming that Section 9 imposes any obligation upon you to suspend the pension granted to the widow of any fireman by reason of the fact that such widow may have obtained a judgment against the City of Chicago under the terms and provisions of the Workmen's Compensation Act.

So much of Section 9 as it is material for us to refer to provides that if any fireman of any such city receives any compensation or allowance from such city under and by virtue of the law known as the Workmen's Compensation Act, or other similar act, the pension provided for such employe shall be reduced by the amounts so received as the result of the finding under the Workmen's Compensation Act if the amounts be less than the amount of such pension, and if any employe receives a sum or sums as compensation or allowance in excess of the pension herein provided for such employe, he shall not receive any pension until after the expiration of the period of time during which the pension payable at the rate herein stated would equal the amount of such excess sum or sums.

You will observe that there is nothing in the foregoing provision of the statute that has any application to pensions granted to the widows of firemen. Your board is authorized to grant pensions to widows of firemen by virtue of Section 10 of the Firemen's Pension Act, which provides that if any

fireman shall die from any cause while in the service, except upon a leave of absence without pay for more than thirty days in any year, or if a fireman shall die from any cause during retirement on account of disability or during retirement after 20 years' service and while in good standing, as provided in the act, and shall leave a widow, minor natural child or children or dependent natural father or mother surviving, said Board of Trustees shall direct the payment from such pension fund to such widow, while unmarried, of the sum of \$5 monthly, and to the guardian of any child or children \$10 while the mother is living and unmarried, and \$15 if the mother is not living, until said child or children reach the age of 18 years. And provided further, if any such child or children, after reaching the age of 14 years, shall not attend school, then such child or children not attending school shall receive \$5 monthly while the mother is living and unmarried, and \$10 monthly if the mother is not living.

Section 7 of the Workmen's Compensation Act provides that in case of the death of any employe the amount of compensation, which shall be paid in case a widow and two minor children under the age of 16 years at the time of the death of the employe shall survive, shall be \$4,000.

Neither the Workmen's Compensation Act nor the Firemen's Pension Act contains any provision that requires a pension, if one is granted to the widow, to be suspended or payment in any way interfered with by reason of the fact that such widow may secure a judgment for the death of her husband under the terms and provisions of the Workmen's Compensation Act. Prior to the passage of the Workmen's Compensation Act, under the statutes of the State of Illinois, a widow or next of kin of any employe dying as the result of injuries sustained by him in the performance of his duty, had a right to sue and recover damages for the loss sustained as a result of his death on account of negligence of the employer, and the Workmen's Compensation Act was passed for the purpose of superseding the statute in question and deprive the employer from interposing a defense of contributory negligence on the part of the employe in the accident that resulted in his death, and the statute fixed the amount of dam-

ages which said widow or next of kin should be entitled to recover.

Mrs. Burke had a right to file a claim for the death of her husband, and her right to do so was not limited in any way by the fact that under the provisions of the Firemen's Pension Fund Act she was entitled to the pension due a widow of a fireman. Both acts are separate and distinct, and her rights under one are not dependent upon the other. The statute fixes the amount of pension which she is entitled to receive monthly from the Firemen's Pension Fund, and this board is without power to suspend the said payments. She is entitled to collect the entire amount of her judgment of \$4,000 from the City of Chicago, and in addition to this, she is entitled to receive monthly her pension from the Firemen's Pension Fund from the date of the death of her husband.

Yours very truly,

JAMES W. BREEN,
Acting Corporation Counsel.

Vaults of Edison Co. Under City Streets.

January 9, 1923.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

Replying to your request for an opinion relative to the right of the Commonwealth Edison Company, under its franchise, to build vaults of various sizes under the pavement of the city's streets, and whether it should be required to pay compensation therefor, we beg to say:

The franchise of the Commonwealth Edison Company, in providing for conduits under the streets, also provides for "manholes or other openings to gain access to said conduits."

If, therefore, the vaults you mention are in fact merely manholes or other openings reasonably necessary to gain necessary access to the conduits laid under the streets, it is

our opinion that they come within the authorization of the franchise granted the company, and that the city has no right to refuse permits therefor, nor to charge any compensation in addition to that specified in the franchise ordinances, namely a percentage on the annual revenue of the company.

Your letter does not specify the sizes of the vaults in question, but we learn from the Edison Company's engineer that a number of these vaults are as large as 8x10 feet and a few of them even larger. While it may seem that that is quite a large "manhole" or "other opening," we cannot say, as a matter of law, that it is any larger than is reasonably necessary, nor that it is any larger than the franchise ordinance permits, since the ordinance does not in terms specify any limit to the size of such openings. Manifestly it was the intention of the City Council to permit openings large enough 'to gain access to said conduits' in such manner as would permit the proper installation and maintenance of the cables as well as give a workman sufficient working space to do his work in reasonable safety. There being no specifications in the ordinance regarding the demensions of space that might be used for that purpose, we believe it was the intention of the City Council to leave it in the first instance to the Commonwealth Edison Co. to determine how much space they might need for such purposes, and so long as the amount of space taken is not clearly unreasonable, and so long as it is used for the purpose specified in the ordinance, it can not, in our opinion, be said that it goes beyond the terms of the ordinance, which, as we have stated, permits the company the use of such space without any other compensation to the city than the specified percentage on its annual revenue.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

JAMES W. BREEN,
Acting Corporation Counsel.

Request for Increase of Pension of Fireman.

January 13, 1923.

TO THE BOARD OF TRUSTEES OF THE FIREMEN'S PENSION FUND
OF THE CITY OF CHICAGO.

Gentlemen :

We are in receipt of your communication forwarding to us the request of John J. O'Neill, who retired from the Fire Department on November 20, 1918, after a service of over twenty years, on a pension of one-half the annual salary of \$1,500, which was the salary attached to the rank of O'Neill on the date of his retirement, to have his pension increased to an amount equal to one-half the annual salary now paid to firemen.

We have read all the correspondence forwarded to us with this request, both from your board and from the firm of Ricker & Nelson, who are the attorneys for Mr. O'Neill.

Mr. O'Neill was pensioned under Section 8 of the Firemen's Pension Fund Act, which provides that any fireman of any such city, after having served twenty years as a fireman, of which the last five years shall be continuous, may retire from active service, and when such retired fireman shall have reached the age of fifty years such board shall direct that such fireman shall be paid a monthly pension equal to one-half the amount of the monthly salary attached to the rank which he may have held in the service at the date of his retirement.

On November 20, 1918, Mr. O'Neill was eligible for a pension under the terms and provisions of the Firemen's Pension Fund Act and he applied for one. The annual salary attached to the rank which he held in the Fire Department on that date was \$1,500 per annum, and he was granted a pension of \$750 per annum, which was one-half the salary attached to the rank which he held in the department on the date of his retirement. The statute does not provide that retired firemen may receive a monthly pension equal to one-half of the salary *which may* attach to the rank which he held in the fire service but, on the contrary, the statute specifically

uses the phrase "attached to the rank," thereby indicating clearly that it was the intention of the General Assembly for the pension of retired firemen to be based upon the amount of salary which they received while in the actual service of the city. This construction of the statute has been followed since the creation of the Firemen's Pension Fund. The language used in this statute is the same as has been used in other pension acts in force and effect in the State of Illinois, and the same construction has been placed upon the other pension statutes.

An attempt was made some time ago by a retired police officer pensioned under the Police Pension Fund Act of 1915, which contained language exactly similar to the language used in Section 8 of the Firemen's Pension Act, to raise his pension to that now provided for police officers, and the courts sustained a demurrer to his petition.

We cannot concur in the interpretation placed upon Section 8 of the Firemen's Pension Fund Act by the attorneys for Mr. O'Neill. It is our opinion that the language used in Section 8 does not justify the interpretation attempted to be placed upon it by the attorneys for Mr. O'Neill.

It is, therefore, our opinion that you should decline the request of Mr. O'Neill for an increase in his pension.

Yours very truly,

JAMES W. BREEN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Filling in of West Fork of South Branch of Chicago River.

January 24, 1923.

HON. CHARLES SCRIBNER EATON, Chairman, Committee on Efficiency, Economy and Rehabilitation.

Dear Sir:

In reply to several verbal requests from you for an opinion relative to the authority of Congress and that of the

State of Illinois and its governmental subdivisions to authorize the filling in of the West Fork of the South Branch of the Chicago river, and relative to certain other legal questions connected therewith, we respectfully submit the following:

As to the ownership of the bed of the Chicago river as well as the beds of all other rivers in this state, the Supreme Court of Illinois has uniformly held that the same is in the abutting property owners, subject to the public rights of navigation. As early as the case of *Middleton v. Pritchard*, 3 Scam. 509, 519, the court said:

“To understand more fully the application of these principles to riparian ownership, it is necessary to advert to the distinction at common law, between streams navigable *de facto*, and those deemed to be so in law.

“At common law, only arms of the sea, and streams where the tide ebbs and flows, are deemed navigable. (6 Cow. 540, Chap. 4, 5; Wend. 443, 463.) Streams above tide water, although navigable in fact at all times, or in freshets, were not deemed navigable in law. (6 Cowen, 537, note.) To these, riparian proprietors, bounded on or by the river, could acquire exclusive ownership in the soil, water and fishery, to the middle thread of the current; subject, however, to the public easement of navigation. (3 Kent. Com. 427, etc.; 6 Cowen, 537 note; 6 Wend. 444.) And this latter, Chancellor Kent says, bears a perfect resemblance to public highways. (3 Kent’s Com. 432.)”

In the case of *City of Chicago v. McGinn*, 51 Ill. 266, 272, our Supreme Court said:

“Neither the Illinois, the Mississippi, nor the Chicago river is a navigable stream *in the sense of the common law*, which obtains in full force in this state by legislative enactment. No rivers, by the common law, are deemed navigable above the ebb and flow of the tide. The stream above belongs to the riparian proprietors on each side of it, *ad filum aquae*. *Middleton v. Pritchard*, 3 Scam. 510. The same doctrine was reiterated in the late case of *Ensminger v. The People ex rel. City of Cairo*, 47 Ill. 384. *This being so, the water and bed of the Chicago river are the property of the riparian owners, subject only to an easement in the public, for the purposes of navigation.*

And in the case of *People v. Economy Light & Power Co.*, 241 Ill. 290, our Supreme Court said (p. 318) :

“There is no difference in the application of this rule between navigable water-courses and those which are not navigable. In grants upon navigable waters above tide waters the riparian owner takes title to the thread of the stream, subject to an easement in the public for the purpose of navigation, while as to waters not navigable the title to the bed of the stream passes absolutely, free from any burdens in favor of the public.”

In the case last cited the Supreme Court of Illinois held that the Desplaines river was not a navigable stream, either in fact or in law. As to the latter proposition, however, the Federal court afterwards ruled differently in the cases of *Economy Light & Power Co. v. U. S.*, 256 Fed. 792, and *Economy Light & Power Co. v. U. S.* 256 U. S. 113, where it was held that the Desplaines river (as well as the West Fork of the South Branch of the Chicago river), while not in fact navigable was in law a navigable stream and therefore one of “the public waters of the United States.” But in neither of the two cases last mentioned did the court question the title of the riparian owners to the bed of the stream.

Other cases holding that the title to the rivers in this state is in the riparian owners, and that the public merely has an easement therein for purposes of navigation, are the following :

Canal Trustees v. Havens, 11 Ill. 554.

Ensminger v. People, 47 Ill. 384.

Braxon v. Bressler, 64 Ill. 488.

Washington Ice Co. v. Shortall, 101 Ill. 46.

City of Chicago v. Van Ingen, 152 Ill. 624.

Griffin v. Johnson, 161 Ill. 377.

R. I. & P. Ry. Co. v. Leisy, 174 Ill. 547, 557.

Ballance v. City of Peoria, 180 Ill. 29.

Albany R. R. Bridge Co. v. People, 197 Ill. 199.

City of Peoria v. Central National Bank, 224 Ill. 43.

Kinsella v. Stephenson, 265 Ill. 369, 378.

Sikes v. Moline Consumers Co., 293 Ill. 112.

Such easement for purposes of navigation was originally controlled by the several states, but when the Federal Constitution was adopted, which provided (in Art. I, Sec. 8, cl. 3) :

“The Congress shall have power to regulate commerce with foreign nations, *and among the several states*, and with the Indian tribes,”

this was held to confer upon Congress the authority, whenever it so desired, to assume control over any river used in the carrying on of inter-state commerce.

In *Gilman v. Philadelphia*, 70 U. S. 713, the court said:

“Commerce includes navigation. The power to regulate commerce comprehends the control, for that purpose, *and to the extent necessary*, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. * * * *It is for Congress to determine when its full power shall be brought into activity*, and as to the regulations and sanction which shall be provided.

In pursuance of this constitutional authority, Congress did, in 1890, pass the Rivers and Harbors Act, placing all navigable waters of the United States under the control of the Federal Government.

It has held repeatedly, however, by the Supreme Court of the United States, that while the authority of Congress over the navigable waters of the United States is paramount to that of the states, it is not necessarily *exclusive* of the same, but that the states may exercise such concurrent jurisdiction and control over such waters as is not inconsistent with the authority of the Federal Government.

Willson v. Black Bird Creek Co., 2 Pet. 245.

Cooley v. Board of Wardens, 13 How. 299.

Pound v. Turek, 95 U. S. 459.

Transportation Co. v. Chicago, 99 U. S. 635.

Packet v. Catlettsburg, 105 U. S. 559.

Covington Bridge Co. v. Kentucky, 154 U. S. 204.

Cummings v. Chicago, 188 Ill. 410.

Manigault v. Springs, 199 U. S. 473.

People v. Metropolitan Ry. Co., 285 Ill. 246.

In the case of *Cummins v. Chicago*, *supra*, the court said:

“The general proposition upon which the plaintiffs base their right to relief is that the United States, by the acts of Congress referred to and by what has been done under those acts, has taken ‘possession’ of Calumet river,

and so far as the erection in that river of structures such as bridges, docks, piers and the like is concerned, no jurisdiction or authority whatever remains with the local authorities. In a sense, but only in a limited sense, the United States has taken possession of Calumet river, by improving it, by causing it to be surveyed, and by establishing lines beyond which no dock or other structure shall be erected in the river without the approval or consent of the Secretary of War, to whom has been committed the determination of such questions. But Congress has not passed any act under which parties, having simply the consent of the secretary, may erect structures in Calumet river without reference to the wishes of the State of Illinois on the subject. We say the State of Illinois, because it must be assumed, under the allegations of the bill, that the ordinances of the City of Chicago making the approval of its Department of Public Works a condition precedent to the right of any one to erect structures in navigable waters within its limits, are consistent with the constitution and laws of that state and were passed under authority conferred on the city by the state.

“Calumet river, it must be remembered, is entirely within the limits of Illinois, and the authority of the state over it is plenary, subject only to such action as Congress may take in execution of its power under the constitution to regulate commerce among the several states. That authority has been exercised by the state ever since it was admitted into the Union upon an equal footing with the original states.”

This authority of Congress over waterways and other highways of commerce is not, however, limited to *natural* waterways, but it extends as well to canals and other *artificial* waterways, just as it extends, for instance, to railroads, which are always artificially built highways. In the case *Ex Parte Boyer*, 109 U. S. 629, the Supreme Court of the United States in holding that the Illinois and Michigan Canal is one of the “public waters of the United States,” said:

“Navigable water situated as this canal is, used for the purposes for which it is used, a highway for commerce between ports and places in different states, carried on by vessels such as those in question here, is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States, even though the

canal is wholly artificial, and is wholly within the body of a state, and subject to its ownership and control.”

In the case of *The Robert W. Parsons*, 191 U. S. 17, 26, the court said :

“The only distinction between canals and other navigable waters is that they are rendered navigable by artificial means, and sometimes, though by no means always, are wholly within the limits of a particular state; we fail to see, however, that this creates any distinction in principle. They are usually constructed to connect waters navigable by nature, and to avoid the portage of property from one navigable lake or river to another; or to improve or deepen a natural channel; and they are usually navigated by the same vessels that ply between naturally navigable waters at either end of the canal.”

In so far, however, as Congress has not yet assumed jurisdiction over a river or other waterway, or after assuming the same has relinquished it, the control of such river for purposes of navigation is vested in the state and its subordinate governing bodies.

Escanaba Co. v. City of Chicago, 107 U. S. 678.

Willson v. Black Bird Creek Marsh, 2 Pet. 245.

Gilman v. Philadelphia, 3 Wall. 713.

Pound v. Turek, 95 U. S. 459.

Illinois Central R. Co. v. Illinois, 146 U. S. 387.

Since it is within the discretion of Congress to assume jurisdiction over a river or not, as it deems for the best public interest, it must logically follow that it also has authority to *abandon* jurisdiction over a river or other navigable water, if it should deem such a course conducive to the public interest, and our Supreme Court has clearly recognized that right. Thus in the case of *Illinois Central Railroad Co. v. State of Illinois*, 146 U. S. 387, the court upheld the right of Congress to relinquish to the State of Illinois a portion of Lake Michigan, just outside the shore line of Chicago, and its right to consent to the filling in of the same and certainly Lake Michigan is, both in law and fact, quite as much a “navigable water of the United States” as is the West Fork of the South Branch of the Chicago river.

In the case of *Economy Light & Power Co. v. U. S.*, 256 U. S. 113, the Supreme Court of the United States, in defining the status of the Desplâines River, said:

“Since it is a natural interstate waterway, it is within the power of Congress to improve it at the public expense; and it is not difficult to believe that many other streams are in like condition and require only the exertion of federal control to make them again important avenues of commerce among the states. *If they are to be abandoned, it is for Congress, not the courts, so to declare.*”

In the case last cited, the Supreme Court held that since the Desplâines River, *as well as the West Fork of the South Branch of the Chicago River*, had been used in the days of the early settlers as a trade route, and had never been formally abandoned by any act of Congress, the court was without authority to declare it a non-navigable stream, although the court clearly recognized the power of Congress to do so.

It will be noted, also, that under the decisions in *Economy Light Co. v. U. S.*, *supra*, the same rule applies in this regard to the West Fork of the South Branch of the Chicago River as to the Desplâines River. The power of Congress to abandon or disclaim jurisdiction over said river can not, therefore, in our opinion be questioned.

We come next to the question as to the authority of the State of Illinois, and its governmental subdivisions, such as the City of Chicago, to fill in the portion of the river in question.

Much has been said, in the discussion of this project, concerning the ordinance of 1787, organizing the Northwest Territory, which provided:

“The navigable waters leading into the Mississippi and St. Lawrence Rivers, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other state that may be admitted into the confederacy; without any tax, impost or duty therefor.”

Some of those appearing at the hearing before the Congressional Committee appeared to be under the impression

that this provision, in some way, prohibited the State of Illinois from filling in any of the channels of the Chicago River. But we fail to find any legal basis for that impression. Certainly no court has ever held that, so far as we have been able to discover. Even if the above quoted language were capable of that construction (which our own Supreme Court has held it is not), yet we must bear in mind that the ordinance of 1787 was neither a part of the Constitution of the United States nor of that of the State of Illinois, but merely an act of Congress, which Congress may repeal or modify at any time. So that even if the ordinance of 1787 were still in force (which the Supreme Court of the United States has held it is not), and even if, properly construed, it prohibited the filling in, or changing the course of, any navigable channel (which the Supreme Court of Illinois has held it did not), an act now passed by Congress declaring the West Fork of the South Branch of the Chicago River non-navigable, and relinquishing control by Congress over the same, would amount to a repeal or modification of the ordinance of 1787 in that regard.

In the case of *Escanaba Co. v. City of Chicago*, 107 U. S. 678, 688, the Supreme Court of the United States said:

“Whatever the limitation upon her (Illinois’) powers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her after she became a state of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is ‘on an equal footing with the original states in all respects whatever.’ 3 Stat. 536. Equality of constitutional right and power is the condition of all the states of the Union, old and new. *Illinois, therefore, as was well observed by counsel, could afterwards exercise the same powers over rivers within her limits that Delaware exercised over Black Bird Creek and Pennsylvania over the Schuylkill River. Pollard’s Lessee v. Hagan*, 3 How. 212; *Permoli v. First Municipality*, 2d 589; *Strader v. Graham*, 10 *id.* 82.”

This principle has been reiterated in numerous subsequent cases, among others the case of *Economy Light & Power Co. v. U. S.*, 256 U. S. 113, where the court said:

“A state formed out of a part of Northwest Territory has the same power to regulate navigable waters within its borders that is possessed by other states of the Union.”

The Supreme Court of this state, moreover, has held that the intention of the ordinance of 1787 was merely that the public waters of the state should be open to the free use of the citizens of all states, but that that did not mean that the state was powerless to change or alter the course of some particular channel, if it deemed this desirable for the public interest, nor to fill up a comparatively useless channel, when the public interest could be best served that way; that so long as the *substance* of the right guaranteed to the citizens of all states, namely, the free use of the *trade route* specified was secured to them by the use of some proper channel, the disposition of other channels along the route was of no consequence to them.

People v. City of St. Louis, 10 Ill. 351.

In the present instance, the chief channel of the *trade route* from the Chicago to the Illinois River now runs along the Chicago Drainage Canal, admittedly a much better channel than the West Fork of the South Branch of the Chicago River. So long, therefore, as the right to navigate the “waters leading into the Mississippi” along this channel is maintained, the *substance* of the right given by the ordinance of 1787 is in full force.

In the case of *People v. City of St. Louis*, 10 Ill. 351, the Supreme Court of Illinois, in holding that the State of Illinois had the power, if it deemed it advisable, to fill up one of the navigable channels of the Mississippi River, said:

“By the fourth article of the ordinance of 1787, it is provided, ‘that the navigable waters leading into the Mississippi and St. Lawrence Rivers, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those

of any other state that may be admitted into the confederacy, without any tax, import or duty therefor.' * * *

The ordinance itself does not declare the Mississippi River to be a common highway and forever free to all the citizens of the Union, but the navigable waters leading into it. This common right of the free navigation of that river was considered as already existing, and the extent and nature of that right may be understood from the provisions made in relation to the tributaries, as all were undoubtedly intended to be placed on the same footing. There are two prominent restrictions upon the states to be formed; one was that these rivers should never be closed against the citizens of other states, and the other that no tax, impost or duty should be exacted of them for the navigation of these highways. Where no material or substantial obstructions are created by the states, within whose limits those rivers run, the citizens of the other states can not complain. *The substance of the right secured is that of free transit.* Suppose one state or nation guaranty or grant to the citizens or subjects of another, the right of freely traveling over its public roads, would it be denied that such state or nation might narrow or change the location of such road, provided its free and commodious passage was not interrupted thereby? It is the substance of the right that is to be observed, and when that is enjoyed, no ground of complaint exists. *The several states may, within their own jurisdictions, do whatever they please with this river, so as they do not infringe upon these rights, nor otherwise violate the rights of others.* This power is necessary to the states for the proper management of their own domestic concerns, and has been habitually exercised by all ever since their first formation. *They may change the current of this river, or even stop up some of its confessedly navigable channels, whenever they find it necessary to their own well being, the same as any other highway,* taking care that they leave a free navigation to those who have a right to navigate it. As in the case before us, admitting this eastern channel to be unquestionably navigable, and hence a part of the highway, this state has a right to fill it up entirely and unite the island with the mainland, if the main channel is still left open to free and uninterrupted navigation. If, in doing this, private property would be damaged, compensation would have to be first made for that. The exercise of such a power, at this or some other point might be indispensable for the

terminus of a railroad or canal or some other public work. *Without this power, the jurisdiction of the states over this portion of their territory would not be worth the name.* It requires no vivid imagination to see in the future, the immense improvements that are to spring up all along both banks of this river from its source to its mouth, which will be of immense advantage not only to the states in which they are situated, and the local interests in their neighborhood, but to the general navigation of the streams, and all made, too, by the exercise of this power by the states over this great public highway. *To deny this is to deny the right of improvement,* as well as the power of injury. The absolute necessity of this power may be illustrated by many familiar instances; such as the improvement of the Naples flats in the Illinois River. There the river is broad, and nearly as navigable in one part as another, and who would deny the right of the state to compress the water into a narrow compass, and thus deepen the channel?"

We note from the foregoing authorities that a navigable river is a *public highway*, and that the public easement in the same is exactly analagous to that in a highway on land. *Query*—Would the State of Illinois, or the City of Chicago (the federal government having abandoned the stream) have the authority to change this highway from a waterway to a land highway without the consent of the abutting or riparian owners? The case of *People v. St. Louis, supra*, it will be noted, holds that this could be done, provided any property owner who is damaged by the change is compensated for the loss sustained. This is perhaps on the same theory that any fundamental change in a street, such as change of grade, etc., would entitle an abutting property owner to compensation for any direct injury thereby caused to his property.

There remains the question whether the City of Chicago, without any additional authority from the Legislature of the state, is authorized to make the contemplated change. As to this, it must be admitted there is some doubt. The Cities and Villages Act does, indeed, give the City Council power:

"Seventh. To lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same."

Also :

“*Thirtieth.* To deepen, widen, dock, *cover*, wall, *alter* or *change* channel of water courses.”

Ill. Rev. Stat., Chap. 24, Art. IV, Sec. 1.

While it might be argued that the contemplated undertaking amounts to the *covering*, or *altering*, or *changing* of the channel of a water course (as we understand it is contemplated to turn the fork of the river in question into the Drainage Canal somewhere west of the city limits), and while it might also come under a broad interpretation of the power to lay out and extend streets, yet in view of the uncertainty as to just how strictly the courts would construe the above powers of the City Council, we are of the opinion that it would be advisable to endeavor to secure more specific authorization from the Legislature for the enterprise in question.

Our conclusions from the principles above considered are : that the West Fork of the South Branch of the Chicago River is a *public highway*, in which the abutting or riparian property owners own the fee, but in which the State of Illinois, in behalf of the public, owns an easement for highway purposes (in this case for navigation), and in which the government of the United States, in behalf of the people of the several states, likewise owns an easement for like purposes; that Congress is clothed with full discretionary power to relinquish such rights of the United States in the stream; that in the event of such relinquishments the jurisdiction over the stream for purposes of navigation would revert to the State of Illinois; that the State of Illinois and its governmental subdivisions would then have full authority to relinquish such public rights of navigation and, with the consent of the riparian owners (and even without their consent, if they are lawfully compensated for any resulting injury) to fill up the river and convert it from a water highway to a highway on land.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved :

SAMUEL A. ETTELSON,

Corporation Counsel.

Statute of Limitations on Unpaid Warrants.

January 24, 1923.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

In reply to your request for an opinion relative to what the provisions of the statute of limitations are in relation to unpaid warrants for collection rendered by the city on account of inspection services and other matters, we beg to state that Sections 15 and 16 of the statutes of limitation read as follows:

“15. ON ORAL CONTRACTS, DAMAGES, ETC.) §15. Actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, *and all civil actions not otherwise provided for*, shall be commenced within five years next after the cause of action accrued.

“16. ON WRITINGS—NEW CONTRACT.) §16. Actions on bonds, promissory notes, bills of exchange, written leases, *written contracts*, or other evidences of indebtedness in writing, shall be commenced within ten years next after the cause of action accrued; but if any payment or new promise to pay shall have been made, in writing, on any bond, note, bill, lease, contract, or other written evidence of indebtedness, within or after the said period of ten years, then an action may be commenced thereon at any time within ten years after the time of such payment or promise to pay.”

In view of the above statute we are of the opinion that the time for filing suits on the claims mentioned in your letter where there is a written contract is ten years and in all other cases referred to in your letter five years.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Delivery of Goods Before Execution of Contract Which Is
Abandoned.**

January 25, 1923.

HON. GEORGE E. CARLSON, Commissioner of Gas and Electricity.

Dear Sir:

We are in receipt of your request for an opinion as to whether the Chicago Pressed Steel Company can hold the city responsible for a quantity of globe holders, manufactured and shipped by them to your department after you had notified them that they were the lowest and best bidder for the same and that it was your intention to have a formal written contract executed to them, and after your further request to them that, in order to save time, they start to manufacture the globe holders, at once, without waiting until the contract had been signed. We understand from your letter that the mayor or comptroller, or both, refused to sign the written contract and that it has never, therefore, been executed.

We beg to state that, in our opinion, there is nothing in the facts thus stated that would render the city liable for the goods shipped. The specifications under which the company submitted its bid, specifically stated,

“The contractor and his agents shall be governed by any and all ordinances of the City of Chicago.”

Indeed, that would have been his legal duty, even without any express stipulation to that effect.

The specifications further provide that a written contract shall be entered into, the general form of which is set out. And the ordinances of the city provide that all such contracts must be signed by the mayor and comptroller before they shall have any force or validity. Until that was done (and we understand it never was done in this case), there could be no complete contract.

In Dillon on Municipal Corporations (5th ed.), Sec. 810, we read:

“After the opening of the bids, the ascertainment of the lowest and most favorable bidder, and the adoption of a resolution that the contract be awarded to him,

does not make a completed contract between the municipality and the bidder when the charter requires that all contracts relating to city affairs shall be in writing, or when the advertisement so specifies, or when some further step remains to be taken, and some discretion is left in the officers of the municipality to ascertain the responsibility of the bidder, or to satisfy themselves of the expediency or desirability of contracting with him."

In the case of *B. & O. S. W. Ry. Co. v. People*, 195 Ill. 423, our Supreme Court held that public acceptance of a bid for the erection of a school house and a decision to execute a written contract to that effect did not of itself constitute a contract until such written contract was actually executed. The court said (quoting from 7 Am. & Eng. Law, 2 ed., 140) :

"Many cases occur where parties negotiating a contract contemplate that a formal agreement shall be drawn up and signed. The question arises, does such a contemporaneous understanding and agreement make the validity of the contract depend upon its being actually reduced to writing and signed? The true rule may be stated in these words: Where the parties make the reduction of the agreement to writing, and its signature by them, a condition precedent to its completion, it will not be a contract until that is done. And this is true although all the terms of the contract have been agreed upon."

Under the facts in this case, and under the rule of law above stated, we are of the opinion, therefore, that no complete contract has as yet been entered into between the company and the city; and an incomplete contract is in law no contract at all.

Regarding your request to the company, after the opening of the bids, to get ready and start manufacturing the globe holders without waiting for the contract to be signed, while it may have been a little inopportune, it did not, in our opinion, have any legal effect whatever, since the company knew, and was by law required to know, that you alone, either as a commissioner or as an individual, had no power to make a complete contract for the goods in question, but that the signatures of the mayor and comptroller were also re-

quired; and the two latter officials not having joined in the request, the company acted upon it at its own risk.

What we have above stated applies equally well whether the company is or is not legally entitled to have the written contract executed. If it has complied with all the requirements of the specifications for the bidding and is entitled to have its contract executed, it has the privilege to go into court in a proper action and ask that the officers in question be compelled to execute the same. But until a complete contract has been entered into, either by the voluntary action of the officers in question or under order of court, the company cannot hold the city liable for any goods manufactured under a contract not yet in existence.

We assume that none of the goods shipped have been *used* by your department. In order to avoid any equitable estoppel on the part of the city we would suggest that you notify the company that you have no authority to receive the goods and that you are holding them subject to their order.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

**Rate of Compensation for Maintenance by City Employees
Privately Owned Automobiles.**

January 30, 1923.

MAJOR A. W. FORD, 439 E. 41st Street, Chicago, Illinois.

Dear Sir:

Your letter of December 8, 1922, with enclosure from Z. L. Blaisdell concerning compensation for privately owned automobiles for the use of dairy inspectors, has been referred to the undersigned for attention.

The corporation counsel does not make a practice of giving opinions to employees in the departments. All re-

quests for opinions should come from the head of the department. What we say here, therefore, is only an informal expression and subject to such modification as the circumstances may warrant in case a request for an opinion is received from the commissioner of health.

The annual appropriation bill for 1922, passed on February 10, 1922, makes provision for a monthly rate of \$75 for privately owned automobiles used by dairy inspectors (see Council Journal of February 10, 1922, at page 1923). No provision for a rate per day having been made, in the absence of any other conditions or circumstances which may not have been brought to our attention by your letter we are of the opinion that the dairy inspectors are entitled to \$75 per month, irrespective of the number of days during the month on which the machines are in use.

Yours very truly,

RUTH C. NELSON,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Publication of Annual Report of Comptroller.

January 31, 1923.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

We are in receipt of your letter of recent date in which you ask what course to pursue with respect to the printing of the Annual Report of the comptroller for the year 1921.

Under the code that existed before the passage of the recent revised code, the comptroller was required to submit to the City Council a full and detailed statement of receipts and expenditures for the preceding fiscal year. This statement, when examined and approved by the Committee on Finance, was to be published by the comptroller.

We gather from your letter that this statement was not submitted by you at the time fixed by ordinance last

year, the reason assigned being that the Finance Committee failed to name a firm of accountants to make the audit. The result is that this statement has not yet been published, and you are occasioned a great deal of trouble because you are unable to comply with the numerous requests for information which would be obtained from this printed report, and your work has been otherwise handicapped.

Under the code recently adopted, there has been a change made, so that, instead of submitting the statement to the City Council before printing, you are required to submit it in printed form, accompanied by the certification of a public accountant appointed by the Finance Committee.

The question you ask is whether you have the right to print the 1921 report, which is still held in abeyance, and make a demand on the Finance Committee to appoint someone to make the certification provided for in the new code.

We are of the opinion that, so far as the statement for the year 1921 is concerned, it should have been submitted to the City Council on or before the first day of April, last year, regardless of whether the Finance Committee appointed a public accountant to go over the books or not. If that had been done, we would say that you were in a position to have the same printed, even though there had been no such certification as was required by the ordinance. The book, when printed, will not have the same standing as one that has been certified to in accordance with the ordinance, but it will undoubtedly be taken as correct by your office and others that you give it to without such certification, and it will relieve you from the annoyance that you speak of.

With respect to the statement for the year 1922, the proper course to pursue is to prepare it, submit it to the Finance Committee, and ask that they secure the accountant for the purpose of certifying its correctness. If the Finance Committee does not do this within such reasonable time as may be necessary in order that the printed report may be in the hands of the City Council by April 1, it will be necessary for you to proceed in the same manner as with the statement for the year 1921.

The gist of what we say above amounts to this, that while the ordinances prescribe a precise manner of procedure, which should be followed in case it is possible for you to proceed thereunder, nevertheless, in case some other officers of the city fail to perform the acts required of them, there is authority for you to proceed in order that the work in your own department may not be hampered.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Appointment of Public Defender.

February 1, 1923.

HON. OSCAR H. OLSEN, Chairman, Committee on Judiciary.

Dear Sir:

Replying to your communication of recent date, transmitting copy of letter from Kathryn Rutherford, president of the Sons and Daughters of America, suggesting that, in connection with vice investigations, a *public defender* be appointed and made a permanent officer, and in answer to your request for an opinion relative to the matter, we beg to say:

The Legislature of this state has not seen fit to make any provision for such an officer, nor to authorize the City of Chicago to establish such an office. Only in a few special instances has any provision been made for an attorney for the defense. Thus, the statute provides that the attorney general shall defend all actions and proceedings brought against state officers *in their official capacity*.

Ill. Rev. Stat., Chap. 14, Sec. 4.

It also provides that the state's attorneys shall defend all actions and proceedings brought against state or county officers in his county *in their official capacity*.

Ill. Rev. Stat., Chap. 14, Sec. 5.

Where city officials are concerned, similar duties would devolve upon the corporation counsel, upon whom the law places the duty of attending to all the law business of the city.

People, ex rel. Ettelson v. Faherty, 306 Ill. 119.

As regards private persons, however, or public officials prosecuted in their private capacity, the law leaves it to them to engage their own attorneys, if they have the means; otherwise the court will, in criminal cases, appoint some attorney to defend them, in case they so desire.

Section 2 of Division XIII of the Criminal Code of Illinois reads as follows:

“Counsel.) § 2. Every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense. In all cases counsel shall have access to persons confined, and shall have the right to see and consult such persons in private.”

And our Supreme Court has held that it is the duty of the court, in such cases, to appoint an attorney with sufficient experience and ability to properly defend the accused.

People v. Blevins, 251 Ill. 381.

An attorney appointed in the last mentioned class of cases to defend the accused, serves only in the particular case in which he is appointed, and serves also without pay (unless some friends of the accused or other generous citizens should volunteer to pay him something), there being no provisions in the law for paying him out of public funds.

With the exceptions above noted, however, the state never undertakes to furnish any attorney for the defendant in a criminal case. The fact is that the state is usually interested only in the proper *prosecution* of such cases, and therefore it has only made provision for a *public prosecutor* and leaves it to the individuals accused to employ their own counsel to conduct their defense.

The question has sometimes been discussed, academically, whether it would not be a wise policy to have a *public defender* as well as a *public prosecutor*, but no practical results

have as yet been reported. In any event, the wisdom or unwisdom of that policy is a matter for the Legislature to determine.

The Legislature having failed to authorize the appointment of such an officer, we must advise that it cannot legally be done.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Licensing of Sightseeing Cars.

February 2, 1923.

HON. CHARLES C. FITZMORRIS, Superintendent of Police.

Dear Sir:

Replying to your request for an opinion relative to whether or not the Public Vehicle License Commission of your department has authority to issue licenses to operators of motor busses and sightseeing cars, we beg to say:

The answer to the question propounded depends upon whether the vehicles in question are "public passenger vehicles," within the meaning of the ordinance.

Section 3929 of The Chicago Municipal Code of 1922 reads as follows:

"3929. *Construction of the term 'public passenger vehicle'.*— The term 'public passenger vehicle' as used in this article shall be construed to include and to mean all vehicles, whether propelled by motive power or otherwise, engaged in the business of carrying persons, for hire, upon the public streets of the City of Chicago. *Provided, however, that no part of this article shall apply to or govern any vehicle hired or obtained from a livery stable or garage and which does not solicit patronage upon the streets of the city, or to any omnibus running by authority of ordinance, law, charter or permit upon a fixed route through the city.*"

You will note therefore that busses "running upon a fixed route," under proper authority, do not come within the juris-

diction of the Public Vehicle License Commission. That clearly excludes motor busses, for they always run on a fixed route. Whether it excludes sightseeing cars is not quite so clear: for while we understand they generally follow a more or less definite route, we are not so sure whether they do not sometimes deviate from the same. That question need not give you any practical difficulty, however; for if they strictly follow a fixed route, they come under the jurisdiction of the Illinois Commerce Commission and must have a permit from that commission in order to operate; and if they have no such authority from the Commerce Commission, then you may safely assume that they are not "running by authority of ordinance, law charter or permit" upon such route, and consequently come under the authority of your commission.

As to motor busses, on the other hand, our Supreme Court has repeatedly held that they constitute public utilities within the meaning of the Public Utilities Act, and therefore come under the jurisdiction of the Illinois Commerce Commission.

Chicago Bus Co. v. Chicago Stage Co., 287 Ill. 320.

People v. Chicago Motor Bus Co., 295 Ill. 486.

Public Utilities Commission v. Bus Line, 290 Ill. 574.

The present Public Utilities Act (and the same was true of the former act), in defining a public utility, says that it is to include any corporation, firm or individual, which now or hereafter

"May own, control, operate or manage, within the state, directly or indirectly, for public use, any plant, equipment or property used or to be used for, or in connection with the transportation of persons or property, or the transmission of telegraph or telephone messages, *between points* within this state."

In construing the expression "*between points*," as used in the statute, the Commerce Commission, as well as the Supreme Court, have interpreted it to mean *along a fixed route, commencing and ending at definite points*.

In the case of *Jacksonville Railway Company v. O'Donnell*, Pub. Util. Rep. 1915 C, page 853, the State Public Utilities Commission (the predecessor of the present Illinois Commerce Commission) decided that it had jurisdiction over motor busses. The Commission said:

"From the evidence in this case, the Commission finds that the respondent owns, controls, operates and manages within this state for public use, a number of automobiles which he is using for the transportation of persons for hire *between points* within this state, and that in the conduct of such business the respondent is a common carrier of persons, and is a public utility within the meaning of the act entitled, 'An Act to Provide for the Regulation of Public Utilities,' approved June 30, 1913, and that as such public utility the respondent is subject to the provisions of said act."

On the other hand it has been held that an ordinary cab company does not come under the jurisdiction of the Commerce Commission because its vehicles do not travel along any fixed route.

Newcomb v. Yellow Cab Co., P. U. R. 1916, B. F. 983.

The same distinction is recognized in other states.

Georgia R. & P. Co. v. Jitney Bus Co., P. U. R. 1915 C, 928.

Smith v. Nunnally, (W. Va.) P. U. R. 1915 C, 177.

Re Jurisdiction over Motor Bus Lines, (D. C.) P. U. R. 1915 E, 642.

Re Auto Stage Lines (Arizona), P. U. R. 1915 C, 945.

Re Regulation of Motor Busses (Md.), P. U. R. 1915 C, 365.

The basis of the above distinction between motor busses and ordinary cabs is thus explained in the case of *George R. & P. Co. v. Jitney Bus Co. supra*:

"The business carried on by respondents is not that of hackmen. The latter have no definite fixed routes or charges. Practically every service rendered by them is a special service rendered to an individual or individuals. Until called into service a hackman cannot know

in advance what it is nor the charge which may be reasonably made therefor. He undertakes, under a special contract, to deliver his patrons at a particular destination, to be designated by the patron. The vehicle for the time is exclusively for his use, and without his consent no one else can enter it.

"The jitney, on the contrary, has its regular fixed route; its charge is fixed; it is the same for any distance over that route, whether only a fraction or the whole of it; the passenger can not demand transportation to a point not on this route; he has no exclusive right to the use of the vehicle for any distance or for any period of time; the carrier, so long as he has room, must take on every one who desires transportation on that route, subject of course to reasonable rules and regulations. The service offered and rendered is common to all the public, and available to all, under reasonable rules and regulations, who desire it. It renders substantially the same service to the public that the electrically driven trolley car performs. The need for regulation is far more apparent than in the case of a hackman. Engaged in the same business of urban street transportation, alongside and in direct competition with the trolley car, and with a volume of traffic by no means inconsiderable, it is not apparent that there is less need of regulation than there is for the trolley."

Our conclusions are therefore: (1) that the Public Vehicle License Commission has no authority to issue licenses to operators of motor busses; (2) that logically it would seem that the same rule should apply to sight-seeing cars, but that they can avail themselves of the rule only if they secure a permit from the Commerce Commission; until they do that they are not "running by authority" of any law or permit, and they therefore come within the language of the ordinance and should pay the regular license fee.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Payment of Special Counsel.

February 2, 1923.

MR. L. E. GOSSELIN, Auditor, Comptroller's Office.

Dear Sir:

Replying to your communication of even date, in which you request us to advise you if it is necessary for the city comptroller to secure the signatures of the president and secretary of the Board of Local Improvements on certain vouchers issued and approved by the corporation counsel for the payment of certain special assistant corporation counsel, we beg leave to advise you that the special assistant corporation counsel, for whom pay vouchers have been issued and are in your possession, were employed by the corporation counsel in compliance with an order passed by the City Council on January 17, 1923, which order appears on page 1664 of the Journal of the Proceedings of the City Council of said date.

The order of the Council expressly provides that the payments authorized therein shall be made under the direction of the corporation counsel and that the city comptroller and city treasurer are authorized to issue pay vouchers for the same when properly approved by the corporation counsel.

In a recent decision the Supreme Court has ruled that the corporation counsel is the head of the Law Department of the city, and it necessarily follows that he is in exclusive control of all attorneys employed to work for the City of Chicago.

The City Council in the Annual Appropriation Bill for the year of 1923 will not make any provision for the payment of attorneys employed by the City of Chicago under any other department except the Law Department.

It is, therefore, unnecessary for the city comptroller to secure the signatures of the president and secretary of the Board of Local Improvements before passing the vouchers for the payment of the special assistant corporation counsel provided for in the order passed by the City Council on January 17, 1923.

We, therefore, recommend that the said vouchers be approved by you for payment.

Yours very truly,

JAMES W. BREEN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Compensation From Chicago North Shore & Milwaukee
Railroad Company.**

February 15, 1923.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

With reference to your inquiry of November 23, 1922, addressed to this office, pertaining to the question as to whether or not the Chicago North Shore & Milwaukee Railroad Company is obliged to pay any compensation to the City of Chicago, this office submits the following opinion:

The City of Chicago has never passed any ordinance granting the Chicago North Shore & Milwaukee Railroad Company the right to operate its cars or trains of cars over any of the city streets, alleys, or public places, or over the rights of way of the North Western Elevated Railroad Company, the Union Elevated Railroad Company and the South Side Elevated Railroad Company, within the city limits. Furthermore, the municipality has never passed any ordinance relative to the payment of any compensation by said Chicago North Shore & Milwaukee Railroad Company to the City of Chicago for the operation of its cars or trains of cars anywhere within the city limits.

The Chicago North Shore & Milwaukee Railroad Company within the city limits operates its cars or trains of cars over and upon the rights of way of the Northwestern Elevated Railroad Company, the Union Elevated Railroad Company, now a part of the Northwestern Elevated Railroad Company, and the South Side Elevated Railroad Company, pursuant to certificates of convenience and necessity issued

by the Illinois Commerce Commission or its predecessor, and, by virtue of a direct contractual relationship between the said elevated railroad companies and itself.

The original franchise ordinances or the amendments thereto, passed by the Council of the City of Chicago and accepted by the elevated railroad companies provided for the operation of cars and trains of cars "*other than those belonging to said companies,*" so that this office is of the opinion that said companies were acting strictly within the exercise of their rights when they contracted with the Chicago North Shore & Milwaukee Railroad Company for the operation of the latter's cars or trains of cars over the rights of way of the elevated railroad companies, as far as the City of Chicago was concerned.

The franchise ordinances or amendments thereto, passed by the Council of the City of Chicago, authorizing the operation of cars or trains of cars over elevated structures within the city limits, specified the amounts of compensation to be paid the city by said elevated railroad companies for such rights and privileges, and the payment of such compensation anticipated the operation of cars or trains of cars of companies *other than the original franchise companies*. The City of Chicago looks to the elevated railroad companies, operating under and by virtue of their franchise ordinances and amendments thereto, for compensation, which includes, indirectly, the train service of the Chicago North Shore & Milwaukee Railroad Company in the absence of any direct contract or agreement between the City of Chicago and the Chicago North Shore & Milwaukee Railroad Company covering the subjects of the operation of the latter's cars or trains of cars within the city limits and compensation to be paid to the city for such privileges.

With further reference to the second paragraph of your letter, the payment of a certain percentage of the gross receipts of some of the elevated railroad companies to the City of Chicago is by virtue of the ordinances passed by the Council of the City of Chicago granting certain privileges and rights to the elevated railroad companies therein

specified, and as the Chicago North Shore & Milwaukee Railroad Company is not a party to, or beneficiary of any of said franchise ordinances or contracts or agreements, the City of Chicago cannot collect compensation from the Chicago North Shore & Milwaukee Railroad Company thereunder. Indirectly, of course, the City of Chicago does realize compensation thereunder, however, due to the fact that the Chicago North Shore & Milwaukee Railroad Company pays compensation to the elevated railroad companies for its privileges and rights, and in so paying the gross receipts of said elevated railroad companies are greatly increased, which means that as the gross receipts of said elevated railroad companies are increased, correspondingly larger compensation payments are made to the City of Chicago by the elevated railroad companies.

Very truly yours,

J. C. SCOFIELD,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

The Application of Edna Irish Brown, Widow of George G. Brown, for a Pension.

February 16, 1923.

THE RETIREMENT BOARD OF THE MUNICIPAL EMPLOYEES ANNUITY AND BENEFIT FUND, Chicago, Illinois.

Gentlemen:

I am in receipt of a communication from the actuary in reference to the above application, together with the finding of the Industrial Commission in the matter of her application for compensation on account of the death of her husband. From such correspondence it appears that the Industrial Commission has awarded her the sum of \$3,806.55.

An examination of the record discloses that the husband of the applicant was employed by the City of Chicago as a master mechanic; that he was injured on the 20th day of

May, 1922, while working on a furnace top at 73rd and Wood streets, and died on the 8th day of July, 1922. On the 8th day of July, 1922, the husband of the petitioner was taken to a hospital and subjected to an X-ray examination, which showed a lump. He was operated on and died upon the operating table. It appeared at the time of the operation that he was suffering from a carcinoma of the bowels. The doctor who treated him from the date of his injury on May 20, 1922, until the day he died was present at the operation, and testified that, in his opinion, the condition found by the doctor in Mr. Brown's back was the result of traumatism which aggravated or caused disability, and that the traumatism in his back caused his death.

The evidence presented to the Industrial Commission seemed sufficient to prove to them that the death of the husband of the petitioner was the result of the injury received while in the employ of the city on the 20th day of May, 1922, and this is clearly indicated by the award granted to the widow.

An examination of the entire record convinces me that sufficient evidence has been presented to justify the conclusion that George G. Brown, husband of Edna Irish Brown, died as the result of injuries sustained by him on May 20, 1922, while in the employ of the City of Chicago as a master mechanic.

I, therefore, recommend that the application of the widow for a pension be granted, and that she be awarded such pension as she is entitled to under the law as the widow of a municipal employe who died as the result of injuries sustained by him while in the performance of duty.

Yours truly,

JAMES W. BREEN,
First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Elimination of Unnecessary Noises.

February 17, 1923.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.
Dear Sir:

With reference to your inquiry of November 17, 1922, relative to your campaign for the elimination of *unnecessary noises* in the public streets as well as elsewhere, and in which letter you ask our opinion as to whether or not your department may prosecute offenders under Sections 2728D and 2728E of an ordinance, entitled, "Regulations concerning the use, operation and equipment of motor vehicles and motorcycles," passed by the Council of the City of Chicago on the 11th day of December, 1911, and set out at pages 1925, 1926 and 1927 of the Journal of the Proceedings of the City Council for said date, and now appearing in The Chicago Municipal Code of 1922 as Sections 4001 and 4002, we submit the following:

Section 4001, Chicago Municipal Code of 1922, provides, that

"Every motor vehicle or motorcycle while being used upon the streets, alleys and public places of this city, shall be provided with a suitable bell, horn or other signal device. It shall be unlawful for any person to use any device which will not produce an abrupt sound sufficiently loud to serve as an adequate warning of danger, and it shall be unlawful for any person operating any motor vehicle or motorcycle to make or cause to be made any unnecessary noise with any such bell, horn or other signal device, or to use the same except as a warning of danger."

It will be noted that this section provides that motor vehicles and motorcycles shall be equipped with a suitable bell, horn or other signal device to be used as an adequate "warning of danger," but that it shall be unlawful for any person operating said motor vehicle or motorcycle to make or cause to be made *any unnecessary noise* with such warning signal device or to use the same except as a "warning of danger."

Therefore this office is of the opinion that in case any person operating any motor vehicle or motorcycle makes or causes to be made *any unnecessary noise* with said warning signal device except as a "warning of danger" that said operation is in violation of said section and is subject to the penalty prescribed therefor in Section 4004 of The Chicago Municipal Code of 1922.

Section 4002 of The Chicago Municipal Code of 1922 provides, that

"No person shall operate, nor shall the owner of any motor vehicle permit to be operated on the streets, alleys and public places of the city any motor vehicle which has not a suitable muffler in a proper and efficient working condition; and it shall further be unlawful for any person to operate or for the owner of any motor vehicle to permit to be operated any motor vehicle with the muffler cut out, or not in operation."

In other words, this section provides that every motor vehicle operating on the streets, alleys and public places of the city must be equipped with a muffler in a proper and efficient working condition, and that it shall be unlawful to operate, or for the owner to permit the operation of any motor vehicle with the muffler cut out or not in operation, and if any motor vehicle is operated upon the streets, alleys or public places of the City of Chicago without a suitable muffler in a proper and efficient working condition or with said muffler cut out, or not in operation, said motor vehicle would be operated in violation of this section, and the operator as well as the owner would in such case be subject to the penalty prescribed therefor in Section 4004 of The Chicago Municipal Code of 1922.

In conclusion, the opinion of this office is that the said sections of said ordinance are intended to prevent the making or causing to be made of *any unnecessary noises* by the owner or operator of any motor vehicle by the use of danger signal devices, and to prevent the use of cut outs on mufflers which are prescribed as necessary equipment for motor vehicles.

As the ordinance itself does not designate any special officer or officers to enforce the violations thereof, there is

no doubt but that your office, members of your staff or yourself, as well as any other interested parties, could *cause* the arrest of the violator of said sections, upon complaint, but the enforcement of all traffic and vehicle regulations is primarily within the province of the Police Department.

If your department contemplates causing the arrest of violators of the above sections of The Chicago Municipal Code of 1922, on complaint, this office advises that caution be exercised and that your department make sure that there is ample proof to establish the fact that said alleged violators are guilty of causing *unnecessary noises* to be made, before arrests are requested thereunder.

Very truly yours,

J. C. SCOFIELD,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Title to Land in Tinley Park.

February 21, 1923.

HON. CHAS. F. NIELSON, Village Clerk, Village of Tinley Park,
Cook County, Illinois.

Dear Sir:

We are in receipt of your communication of recent date requesting an opinion relative to the title of your village to a certain half block of land, originally platted as a market place (at the time the village was laid some forty years ago), but which has never been used for that purpose, and which a certain local church organization built a parochial school house upon, some twenty-two or twenty-three years ago, and has held possession of it since, and now claims title to, by prescription.

In reply we beg to state, that since your letter does not give the facts in very much detail, we must assume certain facts, in answering your inquiry, that are not specifically mentioned. For instance, we are not informed what agree-

ment, if any, was made between the church and the village, in the first place, when the school house was built on the land, and what agreements, if any, have been made between the parties since, whether the church has paid any rent to the village, etc., etc., but we assume from your letter that there have been no such agreements, whatsoever, but that the church has held adverse possession of the premises for over twenty years, under a claim of right, and now claims title thereto.

We note that you seem to be of the impression that in order to claim title by prescription, or adverse possession, for twenty years, it is also necessary to have *paid taxes* for that period. Such is not the law, however. Title by prescription may, under our statute, be acquired in four ways:

1. *Twenty years'* adverse possession.
2. *Seven years'* actual residence, under record title.
3. *Seven years'* payment of taxes and possession under color of title.
4. (In case of vacant land) *seven years'* payment of taxes, with color of title, with or without actual possession.

Illinois Revised Statutes, Chap. 83, Sec. 1, 4, 6 & 7.

You will note that only in the second two cases is the payment of taxes a prerequisite to title by prescription. In the first two it is not. As we are in this instance concerned with the first mode (adverse possession for twenty years), the payment or nonpayment of taxes is immaterial.

We next come to the question, whether this is a case where the statute of limitations applies at all. If the facts are as we have above stated that we understand them to be, we are of the opinion that the statute of limitations will apply.

It is true that the statute of limitations does not run against the state.

Dunne v. County of Rock Island, 283 Ill. 628.

Black v. C. B. & Q. Co., 237 Ill. 500.

Trustees of Commons v. McClure, 97 Ill. 84.

County of Piatt v. Goodell, 97 Ill. 84.

In *County of Piatt v. Goodell*, *supra*, our Supreme Court said:

"*Nullum tempus occurrit regi* (Time does not run against the King) is one of the ancient maxims of the common law, and is the natural offshoot of the maxim, '*Rex non potest peccare*' (the King can do no wrong). Inasmuch as by the latter maxim the king was regarded as incapable of doing a wrong, it necessarily followed that negligence or laches could not be attributed to him, and it was held, therefore, at an early day, that the king was not subject to the statutes of limitation, except when expressly named, and such has been the law from that period up to the present time. The same doctrine has generally been recognized by the courts of this country, both national and state, as applicable to the federal and state governments."

A city or village, however, while it is for certain purposes a governmental subdivision of the state, yet for other purposes it is a voluntary proprietary corporation. Hence our Supreme Court has held that the statute of limitations does not run against a city or village so far as *governmental* rights are concerned (that is, rights which the municipality holds for the benefit of the people of the state at large, but does run against the same so far as proprietary rights of the city or village are concerned (that is, rights which the municipality hold for the benefit of its own inhabitants and with whom the people of the state at large are not concerned).

Brown v. Trustees of Schools, 224 Ill. 184.

Board of Supervisors v. City of Lincoln, 81 Ill. 156.

County of Piatt v. Goodell, 97 Ill. 84.

School Directors v. School Directors, 105 Ill. 653.

Phillips v. Leininger, 280 Ill. 132.

In *Brown v. Trustees of Schools*, 224 Ill. 184, our Supreme Court said:

"There are numerous cases where it has been held that municipalities or minor political subdivisions of the state are not subject to limitation laws in respect to streets and public highways; (*Lee v. Town of Mound Station*, 118 Ill. 304); *but streets and highways are not for the use of the inhabitants of any municipality or locality alone, but for the free and unobstructed use of all the people of the state.* Such rights are clearly dis-

tinguishable from the rights or interests of the inhabitants of a locality in *property acquired for a mere local use*; such as city offices, a library site, or the use of a fire department. Such property is held and used for strictly local purposes.”

In the case of *Trustees of Commons of Kaskaskia v. McClure*, 167 Ill. 23, the court held that since the title to the commons of Kaskaskia was in the State of Illinois, the statute of limitations did not run against the same. But the court added:

“We do not wish to be understood as holding that if the inhabitants of the village of Kaskaskia, as the owners of these commons, had been incorporated, and endowed by the state with full authority to divide, divert and convey such commons, or any part thereof, in fee, the statute of limitations would not run against them as in other cases.”

In the case of *County of Piatt v. Goodell*, 97 Ill. 84, in discussing certain swamp lands held by the county, our Supreme Court said:

“The right of the county to the tract of land in controversy was not of that public character as exempted it from the operation of the limitation act. * * * The public generally had no interest in it in common with the citizens and tax-payers of that county.”

In the present case it seems to us that the contemplated market place in question must be held to have been owned by the village in its private, proprietary capacity for the local benefit of the inhabitants of the village and not in its governmental capacity, for the benefit of the people of the state at large. We are therefore of the opinion that the statute of limitations applies in this case.

Even where the statute of limitations, as such, does not run against a municipality, the municipality may, sometimes, be *equitably estopped* from asserting title to property which it has permitted private parties to occupy for a long time and erect valuable improvements upon. Thus, in *Remy v. City of Chicago*, 268 Ill. 597, our Supreme Court said:

“The statute of limitations does not apply to a city in respect to the possession of its streets and alleys. They

are held for the benefit of the public, and mere non-user or adverse possession alone, cannot divest the public's right to them. Where, however, there are other circumstances indicating a complete abandonment by the public and the municipal authorities, and persons acting in good faith have occupied the premises under a claim of ownership for many years and in reliance upon the acts of the city have made valuable improvements which it would be inequitable to destroy, the doctrine of *equitable estoppel* will be applied and the public held bound by the apparent abandonment of its rights.'

Other cases to the same effect are:

City of El Paso v. Hoagland, 224 Ill. 263.

People v. City of Rock Island, 215 Ill. 488.

Village of Lee v. Harris, 206 Ill. 428.

City of De Kalb v. Luney, 193 Ill. 185.

City of Sullivan v. Tichenor, 179 Ill. 97.

Jordan v. City of Chenoa, 166 Ill. 530.

Lee v. Town of Mound Station, 118 Ill. 304.

Railroad Co. v. City of Joliet, 79 Ill. 25.

If, therefore, the facts in the present case are as we have assumed them to be, and the church, which built the school house on the land in question, has had adverse possession of the same for 22 or 23 years, we are of the opinion that it must now be regarded as the owner of said land, the statute of limitations having run against the rights of the Village of Tinley Park to the same.

We note, also, your request for an opinion as to whether the village trustees can now lawfully vacate the property, so as to give the church the title thereto, or if they should proceed in the form of a sale of the property.

In our opinion, a vacation would not be a desirable form of procedure. For, in the first place, if we are correct in holding that the village has lost title to the premises, then it has nothing to vacate, and an ordinance to that effect would be useless. In the second place, the village could not by a vacation transfer any title to the church. A vacation of property by a municipality is merely a renunciation *for the future* of any interest in the premises, permitting the title thereto to revert to the original dedicator or whoever

holds the reversionary interest in the premises. That is to say, the municipality by a vacation, can merely *abandon* property, it cannot say who shall be the legal owner thereof after it has abandoned it.

Prall v. Burckhardt, 299 Ill. 19.

It follows that a vacation of the property in question now, by the village, would not clear up the title for the church corporation, but would rather muddle it, if it has any effect at all. For such an act of vacation would make it appear of record that the village now claims to be the owners thereof, and if the village is the owner, then the title, upon vacation, would revert to the original dedicator and not to the church (assuming that the act of dedication did not provide otherwise.) The church could not get any title by a vacation unless it has such title already, and if it has, then there is no need of a vacation, and it would be a useless formality.

If the village trustees are satisfied of the fact that the Village of Tinley Park no longer has any right, title or interest in the property, and if they are desirous of assisting the church in making its title clear on the records, (as your letter seems to imply), the simplest method would, in our opinion, be for the trustees to pass an ordinance reciting the facts and ordering that a *quit-claim deed* from the village be given the church. Not that such quit-claim deed would, in our opinion, really convey anything, but it would amount to a *formal notice*, which may be filed with the county recorder, showing that the village has abandoned any claim to the premises. Since such a quit-claim deed would not constitute any actual sale of any property which the village actually owns (but would be intended merely as a formal admission that the village does *not* own it), it need not, in our opinion, be accompanied by any special formalities, such as advertising, sale to highest bidders, etc., which are necessary in the case of actual sales.

In conclusion, we repeat that if the facts are as we understand them to be, the church which has built the school house on the land in question and has held adverse posses-

sion of the same for over twenty years, must now be regarded as the lawful owner of the same, even though it never paid any taxes on the same (the property being exempt from taxation) and if the trustees of the Village of Tinley Park are desirous of assisting the church in removing any cloud that may still exist on its title, by reason of any supposed claims of the village to the premises, the simplest way of accomplishing that result would, in our opinion, be by means of a quit-claim deed executed in the name of the village, by its trustees.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Reduced Bond for City Depositary.

February 23, 1923.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

We have before us your letter in which you state that you have a bond in the sum of \$40,000 from the Skala State Bank, which they desire to substitute for a bond for \$60,000 that has already been approved by the City Council. You also state that the bank bid for \$60,000 of city funds, and that it now desires to reduce its bid from \$60,000 to \$40,000.

We see no way in which a depositary can reduce its bid or the bond which was approved and under which it was accepted as a depositary.

Section 29 of The Chicago Municipal Code of 1922 provides as follows:

“No money shall be deposited in any bank nor any award be effective until such bank has been designated as a depositary and shall have first delivered to the comptroller an indemnifying bond running to the City of Chicago, to be approved by the City Council, in an

amount equal to the amount which the City Council shall determine such bank or depository shall be entitled to receive upon its bid."

It will be seen from the above that before any bank can receive funds from the city it must deliver its bond in an amount equal to the amount that the City Council has prescribed in the ordinance naming it as a depository.

There is provision made in the bond for a substitution of other bonds in place of the bond or bonds submitted in the first instance, and there is provision made in the ordinances for increasing the deposit and necessarily increasing the bond when that is done. Section 33 of said code reads as follows:

"33. INCREASE OF DEPOSIT—BOND.) Whenever any bank named as a depository of the city funds shall desire to have the deposit of such funds increased, the city comptroller is hereby authorized to increase the amount of such deposit to a sum not exceeding one-half the capital stock, surplus and undivided profits of such bank; provided, however, before any increase of such deposit is made, such bank shall present to the City Council a bond securing such deposit and such bond shall be approved by the City Council."

It was not assumed, however, that there would ever be any occasion for providing for the reduction of a bond or the reduction of the deposit, because the only purpose that would be served by that would perhaps be the reduction of the premium that the depository has to pay. It is entirely within the discretion of the city's officers to reduce the amount of the deposit without a reduction of the bid or a reduction of the bond.

We are of the opinion that the manner of handling the city's funds must be in strict accordance with the law, otherwise the city's officers would render themselves liable. Since there is no provision made for reducing the penalty in the bond, and no provision for changing the ordinance at this time so as to reduce the amount the City Council has determined the bank is entitled to, we do not think it would be legal to make the change that is suggested,

There is nothing in the law which would prohibit you from accepting a new bond for \$40,000 from the surety company that has signed the \$60,000 bond and accepting a \$20,000 bond in addition thereto from some other surety, either personal or corporate. The original bond of the surety company, however, could not be surrendered without the City Council taking action. The city's officers are not authorized to return such bonds without express Council authority.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Application for License for Gasoline Service Station at
4726 to 4738 Lake Park Ave.**

February 23, 1923.

MR. JOHN PLANT, Acting Chief, Bureau of Fire Prevention
and Public Safety.

Dear Sir:

We beg leave to acknowledge the receipt of your communication of January 31, 1923, in reference to the above application, together with all documents in relation thereto, and from an examination it appears that on November 29, 1922, an application was made by the applicant for a permit or license to construct and operate a gasoline service station at the above corner. Accompanying this application was a frontage consent petition. This frontage consent petition, in accordance with the custom, was referred to the Map Department for the purpose of verification, and the superintendent of the Map Department reports that it contained a surplus of 73.99 feet.

The filing of the application, together with a petition signed by a majority of the owners of frontage necessary to be secured, was a complete compliance with the ordinance on the part of the applicant.

Relying upon the fact that they had secured the consent of a majority of the frontage owners for the location of the gasoline service station in question, the applicant, on December 20, 1922, entered into a contract with the owners of the above site for the purchase of the property at a price of \$30,000, of which \$1,000 was paid at the time of the signing of the contract. The purchase of this property, the wrecking of the building now on the said site, and the construction of the station will involve an expenditure of \$50,000.

According to the record, no objections or protests were filed against the erection or location of a gasoline service station on this site until January 8, 1923, when a protest was filed and an attempt was made to withdraw signatures from the frontage consent petition, and, under the circumstances, it becomes necessary for us to determine whether or not the persons who signed the frontage consent petition may legally withdraw their signatures from the frontage consent petition.

It has been the rule in the past to permit persons who signed frontage consent petitions to withdraw their names up to the time of the issuance of the license on the theory that no person's rights were prejudiced or damaged until the granting of the license. This case, however, presents a different situation. The original application was made in November, 1922, at which time the applicant presented a frontage consent petition which, when verified by the Map Department, was found to contain a legal majority of the owners of frontage necessary to be secured under the terms and provisions of the ordinance. Relying upon that fact, the applicant entered into a contract to pay \$30,000 for the property, \$1,000 of which was paid upon the signing of the contract and the remaining \$29,000 the applicant is legally liable for. The signers of the frontage consent petition remained silent from November to January, during all of which time the applicant's application for a permit was on file with the city, and the permit for some reason seems to have been delayed. Notwithstanding this fact, no attempt was made to

withdraw signatures until January 8, 1923, when, the record discloses, a communication was filed protesting against the issuance of a permit or license to the applicant.

In view of the period of time elapsing between the filing of the original application and the petition containing the names of the owners of the frontage and the filing of a protest, it is our opinion that if this controversy were submitted to a court of chancery the court would rule that the persons who signed the frontage consent petition are estopped from withdrawing their signatures after the applicant, relying on the *bona fide* frontage consent petition had signed a contract for the purchase of \$30,000 worth of real estate.

It is, therefore, my opinion that the signers of the frontage consent petition should not be allowed to withdraw their signatures and that it is your duty, under the law, the applicant having complied with all the terms and provisions of the ordinances of the city regulating the location of gasoline service stations, to issue a permit in compliance with the application filed with you on November 29, 1922.

We, therefore, recommend that you approve of the application of the applicant, and that you issue the necessary permits authorizing the construction of a gasoline service station at the above location.

Yours truly,

JAMES W. BREEN,

Approved: *First Assistant Corporation Counsel.*

SAMUEL A. ETTELSON,

Corporation Counsel.

Collection of City Funds From City Depositary Closed by Bank Examiner.

March 12, 1923.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

You ask to be advised what steps you shall take with reference to the collection of the city's money in the Logan Square Trust & Savings Bank, which is now closed. You state that \$25,000 of the city's funds are on deposit there; also

that the funds are covered by a bond on which the Fidelity and Casualty Company of New York is the surety.

The writer advised your Mr. Gosselin to telephone to the surety company on Saturday, so that it could not be said that notice was withheld for even one day. It will be proper now for you to follow up this verbal notice by written demand in which you should ask the surety company to pay to the city the full amount on deposit, together with interest to date. No special form of demand is required by law. We suggest something like the following as sufficient:

“To Fidelity and Casualty Company of New York:

“Please take notice that the Logan Square Trust & Savings Bank, one of the city’s depositaries on whose bond, as such depositary, your company is the surety, has closed its doors. There is due from such depositary to the City of Chicago the principal sum of \$25,000 and interest amounting to \$., under the terms of its bid and the award made thereon. Inasmuch as the presentation of a check or demand is not possible, owing to the fact that the bank is closed, I hereby demand, on behalf of the City of Chicago, the sum of \$., the total of principal and interest due to this city from said Logan Square Trust & Savings Bank, such demand being made on you as surety for said bank. The bearer, Mr., is authorized to receive said money.

.....
“City Comptroller of the City of Chicago.”

We suggest that you send this notice and demand to the surety company forthwith. The surety company will probably want to have a release of the claim of the city at the time it makes payment. This you can give in any form the company may desire, without direct authority from the City Council, unless it is requested. The surety company will probably want its bond back also, but that can not be returned to them until an order of the City Council has been passed, authorizing its cancellation and return.

Yours very truly,

LEON HORNSTEIN,

Approved:

Assistant Corporation Counsel.

SAMUEL A. ETTTELSON,

Corporation Counsel.

Contracts for Automobile Tires.

March 13, 1923.

MR. M. GREENSPAN, 3431 So. Michigan Ave., Chicago, Ill.

Dear Sir:

Your letters of complaint to the mayor, relative to the letting of contracts for automobile tires without giving you a fair opportunity to bid on the same, has been referred to this department for reply.

We note your objections that the order of the City Council relative to the matter is (1) unfair to you, and (2) illegal. We shall consider these objections in turn.

As to the first objection, that the order is unfair, we can not see how the mayor can consider that at the present time. For manifestly it is a question of fact and detail which should be taken up with the Finance Committee of the City Council. We note also from your letters and enclosed correspondence that the matter was presented to the Finance Committee, but that the Finance Committee apparently decided against you and on April 11, 1921, unanimously reported, for passage, the following resolution, which also was, on that date, unanimously adopted by the City Council (the vote being 56 to 0 for the same):

“ORDERED, That the Business Agent be and he is hereby authorized and directed, in accordance with the communication from the comptroller to the Committee on Finance, dated March 4, 1921; the communication of the Commissioner of Public Works to the Comptroller, dated March 1, 1921; and the Business Agent's report of bids received, dated March 22, 1921, to place orders, for the remaining of the fiscal year, for automobile tires for all city departments, as follows:

“*Pneumatic tires and inner tubes therefor—*

“Goodyear Tire and Rubber Company and United States Tire Company in such proportion as said Business Agent may determine;

“*Solid Tires—*

“Firestone Tire and Rubber Company;

“*Pneumatic Truck Tires and inner tubes therefor—*

“Goodyear Tire and Rubber Company;

“all in accordance with the bids and proposals of said companies, on file with the Business Agent.

“C. P. April 11, 1921, p. 2289.”

On December 28, 1921, the Committee on Finance, after having received your new proposition as well as your protest, nevertheless unanimously reported to the City Council, for passage, the following order, which was on that day adopted by the City Council by a vote of 55 to 2 (Aldermen Wallace and Steffen voting in the negative):

“Ordered, that an order heretofore passed by the City Council on April 11, 1921, as shown at page 2289 of the Council Proceedings of that date, authorizing the business agent to place orders for automobile tires for all city departments for the remainder of the year 1921, be and the same is hereby amended as follows: By adding after the word ‘year’ in the ninth line of said order the words ‘and for the year 1922.’

“C. P. December 28, 1921, p. 1554.”

It does not appear from your letters that you ever appeared personally before the Finance Committee, and possibly that explains why your propositions received so little consideration from them. We would advise you to get in touch with the chairman of the Finance Committee and arrange to explain to the committee your proposition in person. At any rate it is certainly asking rather much to expect the mayor to look after these details for you.

We understand no order has as yet been passed for the purchase of any automobile tires for the year 1923, but that the matter is now pending before the Finance Committee, to whom we therefore respectfully refer you.

We might add, that it is manifestly impossible for the mayor (or even the City Council) in a city of the size of Chicago, to personally look after details in the matter of purchase of supplies, but in such matters he must be guided largely by the recommendations of the Committee on Finance.

As to the alleged illegality of the order complained of, we do not believe that point is well taken. It is true that

clause 94 of Section 65 (Art. V, Sec. 1) of the Cities and Villages Act gives the City Council power—

“To provide by ordinance, that all the paper, printing, stationery, blanks, fuel, and all the supplies needed for the use of the city shall be furnished by contract, let to the lowest bidder.”

You will note, however, that while this section gives the City Council *power* to pass such an ordinance, it does not *require* it to do so, and as a matter of fact the City Council has never passed any such ordinance. The nearest approach to it is Section 3260 of The Municipal Code of 1922, which reads in part as follows:

“All contracts, when the expense thereof shall exceed the sum of five hundred dollars, shall be let to the lowest responsible bidder, after advertising the same for at least ten consecutive business days, except as may be otherwise provided by law, and shall be approved by the mayor; *but any such contract may be entered into by the commissioner of public works without advertising for bids and without such approval, when authorized to do so, by a vote of two-thirds of all the aldermen elected.*”

It will be observed that this ordinance is very similar in principle to the statutory provision relative to contracts relating to public improvements, where the Legislature saw fit to provide as follows:

“Any work or other public improvement, except any work or public improvement to be paid for in whole or in part by a special assessment shall, when the expense shall exceed \$500, either be constructed by contract let to the lowest responsible bidder in the manner prescribed by ordinance: *Provided, however, any such contract may be entered into by the proper officers without advertising for bids, by a vote of two-thirds of all the aldermen or trustees elected; or such work or other public improvement shall be constructed in the following manner by a vote of two-thirds of the aldermen or trustees elected,*” etc.

Cities & Villages Act, Art. IX, Sec. 50.

Since the Council orders, now under consideration, were adopted by a vote of more than two-thirds of all the aldermen elected, they were in our opinion legal and binding, notwith-

standing they did not provide for letting contracts to the lowest bidder.

Our conclusions are, therefore, that the Council orders complained of are valid; that whether they were fair or not, they have long since expired, and a new order is now pending before the Finance Committee; that if you desire to be heard in regard to such proposed new order you should arrange to appear before the Finance Committee and there explain your proposition.

Very truly yours,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Mushroom Lights on Streets Containing Car Tracks.

March 20, 1923.

HON. ULYSSES S. SCHWARTZ, Chairman Committee on Local Transportation.

Dear Sir:

We are in receipt of a letter from your committee, enclosing a copy of a proposed ordinance requiring all vehicles, operated on the streets of Chicago, to come to a complete stop before driving upon any street car track, also requesting an opinion from the corporation counsel relative to whether moneys from the vehicle tax fund could be used for the purpose of defraying the expenses for mushroom lights to be used in connection with the proposed ordinance.

In reply we beg to say, that if the proposed mushroom lights constitute "street and alley improvements," we know of no reason why they might not be paid for out of the vehicle tax fund, if the City Council should deem it desirable.

The purpose of the mushroom lights in question is, as we understand it, to make the streets more safe, and there can not, therefore, in our opinion, be any doubt that they constitute "improvements" of the streets where located.

Section 4071 of The Chicago Municipal Code of 1922 reads as follows:

“All revenues derived from such license and transfer fees shall be kept in a separate fund and used for paying the cost of street and alley improvement and repair.

“The city collector shall keep a separate account by wards showing the amount of revenue obtained from each ward in which any vehicle not drawn by animal power is kept when not in use, and in which any animal or animals are kept for drawing any wagon or vehicle for which a license is procured under the provisions of this article.

“Fifteen per cent of the total revenues thus obtained shall be set aside, to be expended in the discretion of the commissioner of public works and under his direction, for the repair of such streets upon which there is an unusually heavy amount of traffic.

“So much of the remaining eighty-five per cent of the revenues obtained from each ward, as, in the discretion of the commissioner of public works, may be needed for immediate use, shall be expended under the direction of said commissioner for the repair of streets and alleys in such ward, and the balance thereof shall remain to the credit of such ward account to be used as occasion requires.”

For the reasons above stated we are of the opinion that the mushroom lights in question may properly be paid out of the vehicle tax fund, if the City Council shall so determine.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Power to Regulate Motor Busses.

March 29, 1923.

HON. MATT FRANZ, Chairman Subcommittee of City Council.

Dear Sir:

We are in receipt of your request for an opinion relative to the power of the City Council to regulate or prohibit

the operation of busses on the streets of the city. What you particularly wish to know is, as we understand it, whether the City Council can grant to bus companies franchise licenses, similar or analogous to those granted to street railway companies, to operate upon certain specified streets of the city, and exclude such companies from the city until they shall have obtained such license, and, in any event, exclude them from any particular street, which they have not been specifically licensed to operate upon.

(We are using the words "franchise" and "license" in the strict sense, approved by the Supreme Court, according to which "franchise" means the charter obtained from the state, while the word "license" or "franchise license"—popularly, though inaccurately, also called a franchise—means the *permission* granted by a municipality to a corporation to exercise its franchise within such city.—*City of Chicago v. Rothschild & Co.*, 212 Ill. 590.)

Whether the City Council has the power in question, depends upon the further question whether the right to use the streets for transportation of passengers is a common right, to which all persons are entitled, under suitable rules and regulations, or whether it is a special privilege which may be granted as a matter of favor. If it is a *right*, to which everybody is entitled, then it stands to reason that City Council cannot arbitrarily take it away from some parties, and then hand it back to them in the form of a license or privilege, upon the payment of a consideration. Especially is this true in the absence of any direct authority from the Legislature.

Herb Bros. v. City of Alton, 264 Ill. 628.

In the case of street railway companies, gas companies, telegraph, telephone or electric light companies, or other public service corporations, which place rails, poles, pipes, wires or other physical objects and structures in the streets, it is easy to see that they are exercising a special privilege, which is denied to the general public, and which it is therefore right and proper that they be required to pay compensation for.

In the case also of parks, boulevards and pleasure driveways which are closed to the general public for commercial

purposes, if the owner of a commercial vehicle, such as an omnibus, should seek to operate there, it would not be as a matter of right, but as a matter of special privilege, for which it is proper that he make a reasonable contribution to the park authorities, as compensation for the damages such commercial vehicle is likely to do to the streets and boulevards, planned and paved, as they generally are, to meet the requirements of non-commercial vehicles only. Thus our Supreme Court has held that the Commissioners of Lincoln Park have the authority to exact a reasonable compensation from a motor bus company using the parkways and boulevards for commercial purposes.

People v. Chicago Motor Bus Co., 295 Ill. 486.

Doubtless the same rule would apply to the City of Chicago so far as boulevards and pleasure driveways are concerned, that is to say, streets set aside by the City Council, upon petition of the abutting property owners, as pleasure driveways, from which commercial vehicles in general are excluded.

Hurd's Stat., 1921, Chap. 24, Secs. 435-437.

It does not follow, however, that the City Council possesses any power to exclude motor busses from commercial traffic streets, that is, streets open to the public for general traffic and not limited to a specific purpose like pleasure driveways. Such companies it will be noted, do not place any stationary physical structures on or in the streets (as do street railways) nor do they make any essentially different use of the streets, than does the public at large. Their vehicles travel along the streets, the same as the vehicles of any other person or corporation.

A street is either a commercial street open to traffic generally, or it is a boulevard restricted to pleasure vehicles only. For we find no grant of authority to a city to make any further classification of its streets than this, or to exclude any particular class of vehicles from commercial streets, except possibly such as are inherently dangerous, for instance, vehicles transporting dynamite or other explosives, or carry-

ing such enormous tonnage that they would tend to ruin the roadbed. But, even in such cases, the exclusion must be by general rules, operating alike on all classes of vehicles, similar in character and not arbitrarily excluding some, while permitting others of the same general character to operate.

City of Chicago v. Collins, 175 Ill. 445.

The powers of the City of Chicago are contained in the Cities and Villages Act (Chap. 24, Revised Stat.) which has been adopted by the city and constitutes its charter. Whatever power the city council possesses over the streets and public places must be found in said act. The Cities and Villages Act contains no express provisions respecting motor vehicles, so that the right of regulation or prohibition if the same exists, must be found in the general provisions respecting the use of streets and the right "to regulate the same."

Clause 7 of Section 1, Article V, provides that the City Council shall have power "To lay out, to establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same."

Clause 9 confers power "to *regulate* the use of the same."

The question, therefore, arises whether under clause 9, above quoted, the City Council has power, in *regulating* the streets to *prohibit* the use thereof by any class of vehicles or by ordinance to make the use of the same unlawful. It has been settled conclusively by the weight of authority that "regulate" does not include the right to "prohibit". A brief reference to some of the authorities upon this question is as follows:

The word "regulate" is not synonymous with the word "prohibit." A right of power conferred upon a city to "regulate" does not give authority to "prohibit."

Madden v. State, 68 Kans. 658.

Timm v. Common Council, 149 Mich. 323.

Churchill v. Council, 153 Mich. 93.

State v. McMonnies, 75 Neb. 443.

St. Louis v. Atlantic Quarry, 244 Mo. 479.

People v. Gadway, 61 Mich. 285.

In re Hauck, 70 Mich. 396.

In the case of *City of Chicago v. Hardy*, 66 Ill. App. 524, it was held that a power to license, regulate, tax and restrain runners for stages, cars, etc., did not include a power to prohibit.

In the case of *City of Chicago v. Collins*, 175 Ill. 445, our Supreme Court, in discussing the City's power to "regulate" the use of its streets, said:

"The right to travel on and along the streets of a city belongs to the general public, and does not belong to its denizens alone. The right to travel being in the general public everywhere, all persons have a right to pass along and use the streets and alleys of a city in all their parts, the full width and length thereof. * * * Any usual method of travel along the streets and alleys of a city cannot be declared to be a nuisance. The city Council may regulate the use of the streets and alleys to the extent that it may require sidewalks exclusively reserved for use by pedestrians, and *exclude certain character of loads and regulate the width of tire on vehicles used on a certain character of pavements, and provide that the rate of speed shall be much less on certain streets than on others*, and otherwise regulate the use of streets, having a view solely to the welfare and safety of the public. The city may also regulate certain occupations such as hackmen, draymen, expressmen, and the like, for such regulation is of a police character, having reference to the general welfare, as a means of preventing improper exactions and extortions; and for the same reason a license may be exacted for vehicles used in the transportation of goods and merchandise, or of passengers, or for other purposes of traffic; *but such license is an occupation license, and not one for the use of the streets*. The license in the latter named case is designed to operate upon those who hold themselves out as common carriers, and a license may be exacted from such as a proper exercise of police power."

In *Peace v. McAdoo*, 110 App. Div. (N. Y.) 13, the charter of New York City had conferred upon the police the power to regulate and govern traffic in the streets and the movement of vehicles. The Police Department, in pursuance thereof adopted a regulation prohibiting the operation of certain classes of vehicles over certain streets, claiming that

such operation tended to cause acute congestion on those thoroughfares. But the court held such regulation unlawful, saying:

“I am not cited to any authority, and I find none, which holds that under the power of regulation any public body or officer can, as a general rule, prohibit the passage of all vehicles to and fro in any part of a public street. There are cases which uphold the exclusion of heavy drays lest they break into the roadbed, or of vehicles which carry stuff offensive to the public or dangerous to the public health, or safety. There are cases which uphold the exclusion of persons when they misuse the streets so as to assemble crowds to block the way of the general public. But these judgments are based not on a derogation of the general public right, but in furtherance of it, in that the right is general.”

In the case of *People v. Busse*, 240 Ill. 338, our Supreme Court, in discussing whether a grant of power to “regulate” second-hand stores authorized the City Council to *prohibit* them in certain localities, said:

“The initial question involves a construction of the 95th Clause of Section 1, Paragraph 62, Chapter 24, Hurd’s Revised Statutes of 1908 (Cities and Villages Act). That clause, so far as material confers upon the City Council power ‘to tax, license and regulate second-hand and junk stores.’ Appellee’s position is that this does not empower the city to direct the location of such stores. It is conceded by appellants that the clause does not give to the City Council a general power to prohibit, but it is contended that the word ‘regulate’ as used in the clause, confers the power to prohibit within certain localities less than the entire territory included in the city. The word ‘regulate’ is not, according to the definition of any modern lexicographer, so comprehensive in its meaning. We have, however, been referred to a number of authorities from states other than our own, in which the power to regulate has been held to include a power to designate the location of a particular business. We think the meaning of the word as used by our Legislature in clause in question may be ascertained by a consideration of various other clauses of this section of the Statute, all of which were enacted at the same time. The 50th clause confers power ‘to regulate’ the sale of meats
* * * and to provide for place and manner of selling

the same.' The 81st confers power 'to direct the location and regulate the management and construction of packing houses * * * within the limits of the city,' etc. The 82nd confers power 'to direct the location and regulate the use and construction of breweries * * * within the limits of the city.' It will thus be seen that in each of the three clauses last cited the Legislature apparently recognized the fact that the power to regulate did not include the power to prohibit within a certain territory. Had the Legislature entertained the view of appellants, it would not have seemed necessary to include in those clauses designed to confer the power of location, words for that purpose other than the word 'regulate.' If that word includes the power to prohibit in certain localities, other words found in those clauses giving that power were entirely useless, and we must believe that the Legislature used such other words for some purpose. * * * Such being the case, we think that the word 'regulate' as used in the 95th clause, does not include the power to fix the location of junk stores. The meaning given the word 'regulate' is entirely clear where it is used in the 50th, 81st and 82nd clauses. The same meaning will be attributed to it in the 95th clause, in the absence of anything in the context of the statute to indicate that the Legislature intended to attach to it some other and different meaning. *Rhodes v. Welty*, 48 Ohio St. 234; *P. T. G. Co. v. F. R. R. Co.*, 96 Va. 669."

There would appear to be no valid reason why this construction should not be equally applicable to the use of "regulate" throughout the statute; including Clause 9, Section 65, of the Cities and Villages Act wherein the City Council is empowered to "regulate the use of" the streets and Clause 20 of the same section which gives the power to "regulate traffic" upon the streets.

The fact that an omnibus company operates its vehicles for profit does not place them in any different category, so far as the right to use the streets are concerned, than vehicles used in private business.

In *Jitney Bus Ass'n. v. Wilkes-Barre*, 256 Pa. 462, the Supreme Court of Pennsylvania said:

"As to the right of the municipality to regulate, in the interest of public safety, the running of jitneys, as

well as other traffic upon the public streets, we have no doubt. The only question in such case is whether the requirements of an ordinance for that purpose are reasonable, and not unduly burdensome. Regulation is not to be carried to the extent of prohibition. A jitney is an automobile, and by universal custom automobiles are permitted to use the streets of cities, as are other vehicles. The fact that the owners of jitneys derive a profit from their operation, makes no difference in their legal status. Much of the traffic upon the city streets is a matter of profit, directly or indirectly, to those engaged therein. The public highways are for the use of those engaged in commerce or industrial pursuits, no less than for pleasure cars.”

Under the above authorities, and upon the reason of the thing, it seems clear that the City of Chicago has no power to prohibit the use of any lawful vehicle in the streets of the city. The Legislature has not delegated such power to Chicago.

City of Chicago v. Collins, supra.

“The use of the public streets of a city is not a privilege but a right. The municipality in respect of its streets is a trustee for the general public, and holds them for the use to which they were dedicated. The fundamental idea of a street is not only that it is public but that it is public in all its parts, for free and unobstructed passage thereon by all persons desiring to use it.”

Smith v. McDowell, 148 Ill. 51.

This case indicates that the basis of a municipal corporation’s control of its streets is the police power, hence any regulation or ordinance must of necessity be reasonable in its terms or it would be invalid.

A consideration of other clauses of said Article V shows that the right of prohibition is granted in numerous cases, and always by expressed words to that effect, as, for example:

Clause 10: “To prevent and remove encroachments of obstructions upon the same”;

Clause 15: “To regulate and prevent the throwing or disposing of ashes * * * in * * * any street, avenue, alley or public ground”;

- Clause 17: "To regulate and prevent the use of streets, sidewalks, and public grounds for signs, sign posts, awnings, awning posts, telegraph poles, * * *";
- Clause 41: "To license, tax, regulate, suppress, and prohibit hawkers, peddlers and pawnbrokers";
- Clause 44: "To license, regulate, tax or prohibit and suppress billiard * * * and ball alleys";
- Clause 46: "To license, regulate and prohibit the selling or giving away of any intoxicating * * * liquor * * *."

In the above examples the city may *prohibit* as well as *regulate*, but as pointed out before, so far as the use of the streets is concerned, the statute gives the power to the city to *regulate* only.

In *Wiggins v. City of Chicago*, 68 Ill. 372, the court held:

"The city may tax, may license and may regulate the business of auctioneers. The city may not directly prohibit the business, nor can it adopt such unreasonable regulations as would produce such results, or even be oppressive and highly injurious to the business. All means employed for the taxation, licensing and regulation of the business must be reasonable. And this is true of all ordinances of a city."

It would seem therefore that any regulation that the City Council may choose to adopt relative to motor busses, if based on the fact that they operate for hire, would, in order to be valid, have to be broad enough to cover taxicabs and similar vehicles operating for hire; and if based upon size or tonnage, and the consequent increased wear and tear of the streets, it would have to be broad enough to embrace motor trucks, etc., of equal weight, or similar class to the motor bus.

In *Malleable Iron Co. v. Commissioners of Lincoln Park*, 263 Ill. 446, our Supreme Court said:

"The power of the legislature over public streets, so far as the public interest is concerned, is absolute, and it may change their control at its pleasure, giving jurisdiction over them to the city, to park commissioners or such other authority as it may see fit. (*McCormick v.*

South Park Commissioners, 150 Ill. 516.) So long as private rights are not invaded, the legislative authority may vacate streets, may limit their use, and may permit their use for any purpose not incompatible with the object for which they were established. (*West Chicago Park Comrs. v. McMullen*, 134 Ill. 170; *Barrows v. City of Sycamore*, 150 *id.* 588.) Traffic teams may be excluded from a pleasure driveway. *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9."

The above mentioned powers of the city to regulate, have been very much curtailed, however, by the Public Utilities Act, which places the "general supervision" of all transportation companies, operating "between points" (*i. e.*, having regular, fixed route) within the state, in the Illinois Commerce Commission.

Hurd's Stat., Chap. 111a, Art. 1, Sec. 8.

That motor busses, operating along a fixed definite route, "between points" within the state constitute such public utilities as come within the regulatory power of the Illinois Commerce Commission has also been distinctly held by our Supreme Court.

Public Utilities Commission v. Bus Line, 290 Ill. 574.

The same has been held by other tribunals.

Jacksonville Railway Co. v. O'Donnell, P. U. R. 1915 C, 853.

Georgia R. & P. Co. v. Jitney Bus Co., P. U. R., 1915 C, 928.

Smith v. Nunnally, (W. Va.), P. U. R. 1915 E, 177.

Re Jurisdiction over Motor Bus Lines (D. C.) P. U. R. 1915 E, 642.

Re Auto Stage Lines (Arizona) P. U. R., 1915 C, 945.

Re Regulation of Motor Busses (Md.) P. U. R., 1915 C, 365.

But though the Commerce Commission has the power of prescribing how and where such motor bus companies may operate, it cannot deprive the city of its power of taxation, nor of its power to exact an occupation license, or vehicle license from such companies, to the same extent that it may

demand the same from taxicab companies, and similar companies, firms or individuals. Further than that, however, the city cannot, in our opinion, go.

We are, therefore, of the opinion that the City of Chicago has no authority to require motor bus companies to secure any franchise license from the city in order to operate upon its streets; that the right to travel along a public street is a common right, which may be regulated, but cannot be taken away; that the city may require vehicle or occupation licenses from such companies, in the same manner that it may require the same from, for instance, taxicab companies, but that all further regulation of such motor vehicle companies is vested in the Illinois Commerce Commission and not in the City of Chicago.

Yours very truly,
ALBERT HENRY VEEDER,

Approved: *Assistant Corporation Counsel.*
SAMUEL A. ETTELSON,
Corporation Counsel.

Vacation of 49th Street near Leavitt Street.

March 29, 1923.

HON. ALEXANDER MURDOCH, City Engineer.

Dear Sir:

Replying to your request for an opinion relative to the title of the City of Chicago to the portion of 49th street, near Leavitt street, that was marked for vacation by the track elevation ordinance of April 22, 1912, we respectfully submit the following:

Section 17 of the track elevation ordinance in question, reads, in part, as follows:

“All portions of any streets or avenues or alleys extending into or across any of said lines of railway within the limits of the right of way of the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, the Baltimore & Ohio Chicago Terminal Railroad Company and the Union Stock Yards and Transit Company of Chicago, and the Englewood Connecting Railway Company, and within the limits hereinafter described and shown in red on the plat hereto attached and made a part of this ordi-

nance, except the streets and alleys enumerated above, in which subways are required to be constructed, *shall be discontinued and vacated.*”

It will be noted that the words of vacation found in this ordinance are not the usual phraseology commonly used in ordinances for the vacation of streets; for there it is usually provided that the street “*be, and the same is hereby, vacated,*” while in this ordinance it is merely provided that the streets in question “*shall be discontinued and vacated,*”—manifestly at some future date.

In our opinion, the track elevation ordinance in question contemplated that the streets therein enumerated should be vacated only when the tracks had been elevated; that when the latter event had occurred, one of two things was to take place:

1. Either the City Council was then to pass a formal ordinance vacating such streets; or
2. The elevation of the tracks and consequent closing of the streets was itself to be taken as an abandonment of such streets by the city.

In either event, there would be no vacation of the streets until the tracks were elevated, which was to be finished by December 31, 1918.

The time specified in said ordinance for the completion of said track elevation expired several years ago, as did also the extension of time subsequently granted. In our opinion, the contingency, upon the happening of which it was provided that said streets “*shall be*” vacated, has therefore never occurred. Nor has the City Council by any subsequent ordinance formally vacated said streets.

We are, therefore, of the opinion that no part of 49th street, in the vicinity of Leavitt street, has been vacated, but that the same is still a public street of the City of Chicago, and subject to any legitimate street use by the city.

Very truly yours,

CARL J. APPELL,

Approved: *Assistant Corporation Counsel,*
SAMUEL A. ETTELSON,
Corporation Counsel,

Disposition of Pullman Pumping Station.

March 30, 1923.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

Replying to your request for an opinion relative to the city's title to the Pullman Pumping Station at 109th street and I. C. Railroad, at which you say pumping has been discontinued, we beg to state that we find from an examination of the deed that this property was deeded to the City of Chicago, by the Pullman Land Company, for a sewer pumping station, "and for no other purpose," and on condition that if it should at any time cease to be used for such purpose, it should revert to the grantor. We might add, that a reversion of the land would also carry with it any buildings, structures or permanent fixtures, attached to and forming a part of the real estate, but not any equipments not so attached to the realty.

We understand that the Company is now demanding that the city deed the property back to them by a quit claim deed. We know of no law requiring the city to do that; and, in no event, have any city officials any authority to execute such a deed, unless expressly authorized by the City Council.

Whether or not the property has been abandoned by the city, within the meaning of the deed of conveyance, (which, of course, would mean a permanent and not merely a temporary abandonment), is a judicial question, which the courts ought to pass upon. So long as the City Council has passed no order or resolution formally abandoning the property, neither the corporation counsel, nor any other city official, should be asked to virtually adjudicate what amounts to a judicial question.

The customary procedure in such cases, is for the party, claiming a reversion, to apply to the courts to establish his rights thereto. We see no reason why the company should not follow that course in this case, unless they wish to apply

to the City Council to formally declare the premises abandoned by the city and to order a quit claim deed to the company to be executed.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Use of Surplus Remaining from \$8,000,000 Bond Issue.

April 4, 1923.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

We are in receipt of your letter of recent date, concerning the balance on hand from the \$8,000,000 bond issue authorized by ordinance passed on January 19, 1921. (Council Journal, page 1623.)

You state that there were general corporate bonds issued under authority of this ordinance to the amount of \$8,000,000, and that there is a balance remaining to the credit of the fund of approximately \$200,000 which you desire to use for payment of judgments obtained against the city since January 1, 1921. You point out that outstanding judgments carry interest at the rate of five per cent, and that the city obtains only three per cent on its money in the city depository banks; that therefore, it is desirable to use the balance on hand for the purpose of paying up these judgments that have accrued since January 1, 1921.

The statement made by you is not technically accurate, because the bonds you speak of were not in the full sense "general corporate bonds," but were issued with a limitation on their use. If they were in all respects "general corporate bonds" we would have no hesitation in saying that the money could be used as you want to use it, but the fact that these bonds were issued for specific purposes as set forth in the ordinance makes the question more difficult.

The purposes mentioned in the ordinance authorizing this issue, are as follows:

“Paying indebtedness accrued prior to January 1, 1921, by the City of Chicago, payable out of funds provided for general corporate purposes,”

and

“Paying judgments heretofore rendered against the City of Chicago and outstanding on the 31st day of December, A. D. 1920.”

It should require no argument to convince you that the bonds were issued for specific purposes. Hence, they came within the provisions of Section 4 of Article VIII of the Cities and Villages Act, which provides that when there is a tax for payment of any particular debt, appropriation or liability, the same should be included in the total amount assessed by the City Council, and that it should be certified to the county clerk in such way that the proportion of the total amount applicable to the payment of the particular debt, appropriation or liability may be determined from the certification. Then it is provided that—

“* * * the city or village treasurer shall set apart such proportion of the tax collected and paid to him for the payment of such particular debt, appropriation or liability, and shall not disburse the same for any other purpose until such debt, appropriation or liability shall have been discharged.”

You will see from the above that the law prescribes that you have no right to disburse any of this money until the particular purposes for which it was levied have been disposed of by payment in full. We understand such payment in full has been made, and it is on the assumption that the fund is now free from this restriction that we proceed.

There is no provision of the statute which says that after such payment in full, the money can not be used for other purposes—in fact there is no provision which says what, if anything, shall be done with the money after that. The only light we can get on this point is from court decisions on propositions somewhat similar although not strictly analogous.

There have been decisions to the effect that where there

has been an excess amount collected by reason of too liberal allowance for loss and cost, such excess, if it is not an unreasonable amount, is to be applied to loss and cost on the bond levies for the succeeding year; and if it is an unreasonable amount, the taxpayer may object and receive a reduction on his taxes.

The Supreme Court, in the case of *People ex rel. Stuckart v. Sandberg Company*, 277 Ill. 567, speaking of such excess, made use of the following language:

“If there be any excess any year left over, such excess should be kept separate and paid out thereafter by the county authorities, not for the general expenses of the county but for the loss and cost of collecting bonds as it may be needed in the future.”

It will be noted that this decision speaks only of the excess obtained by reason of the allowance for loss and cost. It does not relate to balances left in the bond fund itself. Such balances in the bond fund, after payment of all obligations chargeable thereto, are usually not great, and there seems to be no direct decision on the question of what shall be done with them.

Heretofore, we have always advised that such small balances could be turned into the general corporate fund, on the theory that it was not practicable to return the money to the taxpayers, and there was no way of keeping it in a separate fund which could be lawfully used for the same purpose as in the case of excess on account of loss and cost. Having in mind that the court has never specifically declared that any balance which might remain on hand after the payment of the obligation for which bonds were issued could not be turned into the general corporate fund, we have, therefore, as stated above, assumed that it could be so used, and have advised you heretofore that such small balances as might be regarded in the nature of a remnant could be turned into the General Corporate Fund.

Another reason for assuming that the balance of a bond fund, after all obligations to be met therefrom have been paid, may be available for general corporate purposes, is that by

implication the statute quoted above seems to give that authority.

In the present instance, it is your purpose, as stated in your letter, to apply the balance to the same kind of obligations as were expressly authorized by the ordinance providing for the issuance of these bonds. While in legal effect the use of the balance as proposed amounts to the same thing as turning the money into the general corporate fund, its use for the express purpose in view will at least protect the city from any loss in case at some time in the future it should be held that the judgments you desire to pay would more properly have been paid out of some other fund. The nature of these obligations is such that they must be paid, and the worst that can happen is that you may at some future time be compelled to reduce the general corporate tax levy or some other judgment funding bond levy to meet the requirement.

We, therefore, recommend that the balance on hand be used for the payment of judgments that have accrued since January 1, 1921, in case all obligations directly chargeable to the fund have been fully paid.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Claim of Ketler-Elliot Co., on Wells Street Bridge.

April 6, 1923.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

We are in receipt of your letter of the 16th instant concerning claim of Ketler-Elliot Company growing out of delays for which the city was responsible during the construction of the Wells street bridge.

Your question is whether the City Council would have the right to authorize the payment of additional compensa-

tion if it should appear from facts and figures submitted that the company suffered a loss through the fault of the city.

Your question is very general in its scope, and the information given us in the matter is meager. Necessarily our answer will have to be confined to a general statement of the law which you will have to apply to the facts.

We are informed that the Ketler-Elliot Company was the contractor for the superstructure; that it took the contract when labor and materials were cheaper than when the work was done; that the contract called for the completion of the structure at a given time, but that the substructure was so much delayed that it was not ready for work on the superstructure until after the time limit for the completed job had expired; that after the work of the superstructure was started it was at one time suspended for a long period by order of the City Council owing to lack of funds; that by reason of these delays, none of which are due to any negligence of the company and a part of which at least are attributable to the city, the Ketler-Elliot Company suffered great loss for which it seeks compensation.

The statutes and ordinances to a certain extent protect the city against improvident contracts and dishonest contractors. But while those laws are designed to make it difficult to collect extras from the city, they are not intended to make the city immune from damages in case of breach of contract on its part. In that respect the city stands in precisely the same position as a private party.

The law on the subject is stated in a broad way by the following excerpt from Dillon on Municipal Corporations, a work that is regarded as a high authority in such matters:

“If a municipal corporation by its own act causes the work to be done by a contractor under a contract for an improvement to be more expensive than it otherwise would have been according to the terms of the original contract, or if the municipality orders and directs the contractor to perform work or furnish material or labor which is not within the contemplation of the original contract, it is liable to him, in the absence of stipulations to the contrary, for the increased cost or for the extra work.” (Fifth Ed., Sec. 813.)

When the city prevented the contractor from carrying out its contract according to the original agreement (assuming that such is the fact), there was a breach of the contract on the part of the city. Under such conditions the company had the option of rescinding the contract or of performing on its part. In either event it had its remedy against the city for the breach and could sue and recover damages. It elected to perform, and it finished its contract, and it now asks for compensation for its loss. The demand is in the nature of a claim for damages for breach of contract.

There is no doubt that the City Council has the power, under the circumstances set forth above, to pass on the propriety of paying or compromising the claim in question. Quoting again from the same authority, we submit the following:

“Growing out of its authority to create debts and to incur liabilities, a municipal corporation has power to *settle* disputed claims against it, and an agreement to pay these is not void for want of consideration. If it has obtained a contract which, by mistake or a change of circumstances, it deems to operate oppressively upon the other party, an agreement to make an *additional compensation*, or to modify or annul it, is not in the absence of special restriction invalid for want of consideration.
* * * As a general proposition, municipal corporations have, unless specially restricted, the same powers to liquidate claims and indebtedness that natural persons have, and from that source proceeds *power to adjust all disputed claims*, and when the amount is ascertained to pay the same as other indebtedness.” Dillon (Fifth Ed.), Secs. 821, 822.

We therefore beg to advise you that under the power granted in Section 1 of Article V of the Cities and Villages Act, “to control the finances and property of the corporation,” the City Council has authority to adjust and settle claims of this kind, and if in its judgment the facts are as

reported to us it will be proper to make the necessary appropriation authorizing the payment of the claim.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Water Tunnel Under Private Property.

April 9, 1923.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

In reply to your request for advice relative to the water tunnel constructed by the City of Chicago under private property, located at Michigan avenue and Eighth street, some 35 years ago, we respectfully submit the following:

We find no documents or agreements of record, authorizing the city to thus use the private property in question, and we assume that none exists.

The use of private property for such purposes is an easement in land, and can only be acquired by an instrument in writing. A parol agreement would be contrary to the statute of frauds.

City of Kewanee v. Otley, 204 Ill. 402.

Tanner v. Volentine, 75 Ill. 624.

Pifer v. Brown, 49 L. R. A. 497.

In the *Otley* case, *supra*, our Supreme Court said:

“The right of drainage through the lands of another is an easement requiring for its enjoyment an interest in such lands, which can not be conferred except by deed or conveyance in writing. (*Pifer v. Brown*, 43 W. Va. 412, 49 L. R. A. 497; *Tanner v. Volentine*, 75 Ill. 624.) The subject of such an agreement would be within the Statute of Frauds, and void, not being in writing. Such is the rule at common law, and such rule obtains and is applicable in this state.”

As we can see nothing different in principle between the water tunnel now under consideration and ordinary drains,

we are of the opinion that the above rule applies equally here.

The question might be raised whether the City of Chicago has not, by prescription, acquired the right to maintain this tunnel on the land in question. Two reasons militate against this view, however: (1) To acquire title by prescription a party must have had open, *visible*, notorious, continuous and adverse possession, with the knowledge of the owner, for the statutory period (*City of Chicago v. Galt*, 224 Ill. 421; *Hofherr v. Mede*, 226 Ill. 320), and it is doubtful whether a tunnel, built like this one, *70 feet below the surface of the ground*, can be said to have been visible possession, as likewise it is doubtful whether it has been with the *knowledge of the owner*; and (2) Such open and visible possession must have continued for the full period of the statute of limitations, that is to say, *20 years*, and in this case we learn from the city engineer that the tunnel was built in 1888 and abandoned in 1907, in other words, the city used it only *19 years*, which is an insufficient time to acquire any rights by prescription. Nor can it, in our opinion be said that the leaving of an abandoned tunnel upon (or under) the land constitutes possession.

But while the city abandoned the tunnel in 1907, we learn from the city engineer that it has never been filled up and probably stands full of water at this time, and we note from your letter, and documents accompanying the same, that the owner of the premises complains that the tunnel will seriously interfere with his building operations.

In view of the law and the facts as above stated, we are of the opinion that the city is without any rights to maintain a tunnel on the premises in question and may possibly subject itself to liability to the owner for damages that may be caused by water flowing from such abandoned tunnel. We therefore beg to advise you that steps ought to be taken to have the tunnel removed.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Exemption of Municipal Employes from Federal Income Tax.

Chicago, April 12, 1923.

HON. SAMUEL A. ETTELSON, Corporation Counsel.

Dear Sir:

I beg to submit herewith the following opinion, in response to queries propounded by you relative to the exemption of municipal officers and employes from the Federal Income Tax:

Query 1:

“Does one have to pay an income tax on his salary as a city, state, county or Sanitary District employe?”

My answer is No, for the reasons hereinafter stated.

The Federal Income Tax Law of 1916 contained this provision:

“The following income shall be exempt from the provisions of this title: * * * the compensation of *all officers and employes of a State or any subdivision thereof*, except when such compensation is paid by the United States Government.”

When the Revenue Act of 1918 was introduced in the House of Representatives, however, this provision was omitted and in lieu thereof a provision was inserted which specifically provided for the taxation of salaries and emoluments of state officers and employes. The last mentioned provision was in turn eliminated by the Senate and was not restored by the Conference Committee. Consequently the Act of 1918, as finally adopted, made no specific mention, one way or the other, as to salaries of state officers and employes. The provisions of that act (copied verbatim in the Act of 1921) provided for income tax on the following (Sec. 213 (a)):

“Gains, profits and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers, and employes, whether elected or appointed, of the United States, Alaska,

Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), *of whatever kind and in whatever form paid.*"

The Secretary of the Treasury interpreted this section to exempt the salaries of state officers and employes from the Income Tax, and, accordingly, on April 16, 1919, he promulgated "Regulation 45," which, by virtue of the statute, has the force of law, and Article 85 of which reads as follows:

"Art. 85. COMPENSATION OF STATE OFFICERS.) Compensation paid its officers and employes by a State or political subdivision thereof, including fees received by notaries public commissioned by States and the commissions of receivers appointed by State courts, are not taxable. Employes of universities receiving salaries paid in part or in whole from funds available under the Smith-Lever Act of May 8, 1914, who are officers or employes of a State, are not required to return as taxable income the salaries so received. This is also true with respect to the Act of August 30, 1890, relating to colleges for the benefit of agriculture and the mechanic arts, and to the Act of March 2, 1887, relating to agricultural experiment stations in such colleges."

Having thereupon requested the opinion of the Attorney General as to the propriety of this ruling, the latter official replied as follows:

"Department of Justice,
May 6, 1919.

"Sir:

"I have the honor to acknowledge receipt of a letter from the Acting Secretary of the Treasury, dated April 18, 1919, asking for an opinion as to whether the salaries of State officials and the salaries and wages of employes of a State are liable to the income tax imposed by the Revenue Act of 1918, approved February 24, 1919 (40 Stat. 1057). The letter is accompanied by the opinion of the Solicitor of Internal Revenue, to the effect that such salaries and wages are not subject to the tax in question.

"In my opinion the Solicitor of Internal Revenue has reached the correct conclusion. This conclusion rests upon the well-settled rule that the governmental agencies of the states are not subject to taxation by the Federal Government, just as the governmental agencies of the Federal Government are not subject to taxation by the

States. *Collector v. Day*, 11 Wall. 113; *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429; *McCullough v. Maryland*, 4 Wheat. 316, 427; *Dobbins v. Commissioners of Erie County*, 16 Pet. 435.

"The Act in question provides that the taxable income shall include, among other things, gains, profits and income derived from salaries, wages or compensation for personal service. It does not specifically mention, by way either of inclusion or exclusion, salaries or wages of State officials or employes. Since, however, there cannot be any doubt that such wages and salaries are beyond the taxing power of Congress, it cannot be assumed that they were intended to be included under the general head of wages and salaries mentioned in the Act. The Act must be construed as applying only to such wages and salaries as can be constitutionally taxed by the Federal Government. I am therefore of the opinion that they are not subject to the tax imposed by the Act in question.

Respectfully,

A. MITCHELL PALMER.

To the Secretary of the Treasury."

31 Opinions of Attys. Gen. 441.

The Secretary of the Treasury thereupon issued the following instructions to the Collectors of Internal Revenue:

(T. D. 2843.)

"Treasury Department

Office of Commissioner of Internal Revenue

Washington, D. C.

"*To Collectors of Internal revenue and others concerned:*

"Section 213 (a) of the revenue act of 1918 provides that gross income shall include 'gains, profits, and income derived from salaries, wages or compensation for personal service * * * of whatever kind and in whatever form paid.'

"In accordance with an opinion of the Attorney General, dated May 6, 1919, and based on the well-settled rule that governmental agencies of the States are not subject to taxation by the Federal Government, it is held that salaries of state officials and salaries and wages of employes of a State are not subject to the income tax imposed by the said revenue act of 1918.

DANIEL C. ROPER,

Commissioner of Internal Revenue.

Approved May 17, 1919,

CARTER GLASS,

Secretary of the Treasury."

That the expression "a state or any *subdivision* thereof," as used in Federal laws and by Federal authorities, includes cities and other municipalities, is well settled.

U. S. v. Railroad Co., 84 U. S. (17 Wall.) 322.

Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 584.

In *U. S. v. Railroad Co.*, *supra*, the Supreme Court of the United States distinctly held that, so far as Federal taxation is concerned, a municipal corporation must be regarded as a subdivision of the state, and that Congress has no more power to tax the municipality than it has to tax the state. The court said:

"A municipal corporation like the city of Baltimore, is a representative not only of the state, but it is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. * * * As a portion of the State in the exercise of a limited portion of the powers of the State, its revenues, like those of the State, are not subject to taxation."

In *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, the court said (p. 584):

"A municipal corporation is a representative of the State and one of the instrumentalities of the state government. It was long ago determined that the property and revenues of municipal corporations are not subject to Federal taxation. *Collector v. Day*, 11 Wall. 113, 124; *United States v. Railroad Company*, 17 Wall. 322, 332."

In the case of *The Collector v. Day*, 11 Wallace 113, the Supreme Court of the United States held that the salary of the Probate Judge of Barnstable County, Massachusetts, was not subject to the Federal Income Tax. The court said:

"In *Dobbins v. The Commissioners of Erie County*, 16 Peters 435, it was decided that it was not competent for the legislature of a State to levy a tax upon the salary or emoluments of an officer of the United States. The decision was placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the government, which could not be interfered with by taxation or otherwise by the States, and that the salary or compensation for the service of the officer was inseparable from the service of the government."

arably connected with the office; that if the officer as such was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt. * * *

“And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. * * * In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?”

In the *Income Tax Cases*, 157 U. S. 584, the Supreme Court of the United States said:

“As the states cannot tax the powers, the operations or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State.”

Other cases to the same effect are:

Freedman v. Sigel, 9 Fed. Cas. No. 5,080.

U. S. v. Ritchie, 27 Fed. Cas. No. 16,168.

Dobbins v. Erie, 16 Pet. 435.

McCullough v. Maryland, 4 Wheat 316.

Ambrosini v. U. S., 187 U. S. 1.

Flint v. Stone Tracy Co., 220 U. S. 107, 158.

Query 2.

“Does one have to pay an income tax on fees as an inheritance tax appraiser for the County Judge and Attorney General?”

My answer is No! For the reasons hereinafter stated.

If the tax appraiser is an officer, representing the state, there appears to be no reason why the same rule as above stated, should not apply.

Section 11 of the Inheritance Tax Act provides (Hurd's Stat. 1921, chap. 120, sec. 376) :

“The said appraiser shall be paid by the County Treasurer out of any funds he may have in his hands on account of the inheritance tax collected in such appraisal, as by law provided, on the certificate of the County Judge, such compensation as such judge may deem just,” etc.

Since the office of appraiser is an office created by statute, and since the compensation is paid by the county treasurer out of funds belonging to the state, (and not, as in the case of an executor or administrator, paid by private parties), there seems to be no valid reason why such appraiser should not be considered a state officer and his remuneration accordingly exempted from Federal Income Tax.

Query 3.

“Does one have to pay income tax on fees received as commissioner on street improvement for Board of Local Improvements?”

My answer is No! For the reasons hereinafter mentioned.

The commissioner is an officer created by statute and his remuneration is paid by the municipality—a subdivision of the state. It would seem therefore that the same rule must apply.

I have found no court rulings or treasury decisions bearing upon this or the preceding query, but I can see no sound reason for drawing any distinction between these and the first point.

It is true, the Treasury Department has ruled, for instance, that the income of an executor or administrator is not exempt from income tax. (O. D. 256; T. B. 16-19-459.) But these officials, though appointed by the court, are not, properly speaking, state officers, but rather represent private parties and receive their remuneration from them, and not from the state.

Likewise, the Treasury Department has ruled that where a *corporation* enters into a *contract* with a municipality to appraise real estate for the same, it cannot claim exemption as a *state officer*. (T. D. 2152, Regulation 33, Art. 4). But while

this may not seem quite consistent with the rule above stated, it can readily be distinguished from the same.

Likewise the Treasury Department has ruled that a "special counsel" casually employed by a municipality, is not an officer, whose remuneration is exempt from income tax. (Letter from Treasury Dept., April 15, 1919—I. T. S. 1919, sec. 3313).

On the other hand, the Treasury Department has ruled that the fees of jurymen (O. D. 309; T. B. 25-19-582) and notaries public (Reg. 45, Art. 85) are exempt from income tax, notwithstanding that the employment of the former are but temporary, and that the fees of the latter are paid by private parties. And receivers appointed by state courts are ruled to be exempted from income tax (Reg. 45, Art. 85) although subject to both these objections.

The distinction that the Treasury Department seems to make is, apparently, whether the office or employment is *one created by a general law* or is merely a casual one, dependent upon a *temporary contract*. As we have seen, however, its rulings are not always logical or consistent.

None of the rulings mentioned under this last heading have, so far as I have been able to discover, ever been adopted or confirmed by any court decisions. But in any event, they are merely special rulings, on peculiar facts, and do not, in my opinion, affect the general rule above mentioned.

An "employee" has been defined by the Committee on Appeal and Review Recommendations of the Treasury Department as follows:

"An employee is one whose duties consist in the rendition of prescribed services and not the accomplishment of specific objects, and whose services are continuous, not occasional, temporary or specific in character or object."

A. R. R. 664 (Sol. Opinion 122.)

Treas. Bul. 45-21-1906.

It might be added, that exempted income need not be listed by the tax payer in his income tax return. Article 71 of Regulation 45, promulgated by the Secretary of the Treasury on April 16, 1919, reads as follows;

“Art. 71. *What excluded from gross income.* Gross income excludes the items of income specifically exempted by the statute and also certain other kinds of income by statute or fundamental law free from tax. Such tax-free income should not be included in the return of income and need not be mentioned in the return, unless information regarding it is specifically called for, as in the case, for example, of interest on municipal bonds. See Article 402. The exclusion of such income should not be confused with the reduction of taxable income by the application of allowable deductions.”

For the reasons above stated, I am of the opinion that the salaries of regular municipal officers and employes are exempt from the Federal Income Tax, but that the income of any one specially employed, under a temporary contract for some special work, is not so exempt.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

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